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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DUQUESNE LIGHT COMPANY, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the purchased-coal clause of the National Bituminous Coal Wage Agreements, which imposes an unconditional monetary penalty on any signatory employer who "deals with" a non-signatory, constitute *per se* an illegal "hot cargo" clause under Section 8(e) of the National Labor Relations Act?

2. Can a labor agreement provision that significantly penalizes every dealing by a signatory with a non-signatory, while freely allowing dealings between signatories, escape summary invalidation under Section 8(e) on the basis that it does not absolutely prohibit dealings with a non-signatory?

3. Can a union signatory clause contained in every agreement of a nationwide union avoid summary invalidation on the basis that the clause may be legal in some applications?*

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* A listing of the parties to the proceeding in the Court of Appeals, along with a list of the corporate affiliations of petitioners as required by Supreme Court Rule 28.1 is set forth as Appendix D hereto.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that Court's judgment of February 27, 1985, in *In re: Bituminous Coal Wage Agreements*, Nos. 84-3166, 84-3167, 84-3220, 84-3237, 84-3371 and 84-8067.

OPINIONS BELOW

The opinion of the Court of Appeals, from which this appeal is taken, is reported at 756 F.2d 284 and appears as Appendix A hereto. The opinion of the District Court is reported at 580 F.Supp. 670 (W.D. Pa. 1984) and appears as Appendix B hereto. The Orders of Court denying petitioners' petitions for rehearing and for rehearing in banc appear as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered February 27, 1985. The Order of the Court of Appeals denying a timely petition for rehearing, filed March 12, 1985, was dated and entered April 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1982):

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter, containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry; *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

STATEMENT OF THE CASE

The background of the purchased-coal clause of the successive National Bituminous Coal Wage Agreements was thoroughly explicated by this Court in *Kaiser Steel v. Mullins*, 455 U.S. 72 (1982). In *Kaiser* this Court held that a signatory employer to the 1974 Agreement could defend against a claim under the purchased-coal clause on the ground the clause, *inter alia*, violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e)("N.L.R.A."). This petition involves the consequent question to *Kaiser*: Is the purchased-coal clause void and unenforceable as a matter of law under Section 8(e)? This issue was raised in 24 actions involving 21 signatory coal operators who challenged the legality of the purchased-coal clause. The cases were consolidated in the Western District of Pennsylvania by the Judicial Panel on Multidistrict Litigation.

The purchased-coal clause of the 1974, 1978, 1981 and 1984 National Bituminous Coal Wage Agreements ("the Agreements") between the United Mine Workers of America ("UMWA") and hundreds of signatory coal operators has remained unchanged since 1974, except for increases in the amount of contributions. The clause requires each signatory employer to "contribute" specified amounts to the UMWA Health and Retirement Funds ("the Funds") "on each ton of . . . bituminous coal . . . procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made. . . ."[1] As both

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1. The complete language of the purchased-coal clause, contained in Article XX, Section (d)(1)(v) of each of the Agreements is as follows:

> In addition to the contributions indicated above, during the life of the Agreement, each signatory employer shall, for the

the Third Circuit and the District Court perceived, the patent operation of this provision and interrelated provisions of the Agreements is to require a signatory to pay a "contribution" for every ton of coal it purchases from a non-signatory. In simple terms, it is a union signatory clause in that it penalizes any signatory who buys coal from a non-signatory, solely because of the vendor's non-signatory status. The clause apprehends its own potential illegality. Each Agreement states that if the purchased-coal clause is held illegal by any court or agency, the UMWA can demand negotiations for a replacement provision.

The purchased-coal clause penalty is unconditional. It applies without exception to *every* purchase of coal by a signatory from a non-signatory, regardless of the particular circumstances of the non-signatory seller or the signatory buyer, or the reason for the purchase.

While the UMWA argued that the clause is a lawful "union standards/work preservation" clause, the clause is not limited to purchases from non-signatories who do not meet "union standards" or purchases which threaten job opportunities for the UMWA employees of the signatory buyer. Instead, the clause by its terms applies to every purchase from a non-signatory, whether the labor standards of that non-signatory vendor are higher or

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periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hour worked contributions converted to tonnage equivalents.). (App. B., 22a-23a.)

lower than, or equal to, those called for in the Agreements, and whether the non-signatory vendor already contributes to a health and retirement fund for its own employees. It applies to purchases made by a signatory that i) already produces to its full capacity, ii) is incapable of producing coal with the particular qualities it requires, or iii) in the case of a coal processor, produces no coal at all, even though none of such purchases adversely affects the work opportunities of the signatory's employees.

The 24 consolidated actions involve both claims for contributions by the Trustees of the Funds (the "Trustees") and claims by the operators for a declaratory judgment that the clause is illegal under Section 8(e).[2] On summary judgment motions filed and argued jointly for the operators, the District Court (Mansmann, J.) ruled that the purchased-coal clause violated Section 8(e) as a matter of law, and granted summary judgment in favor of the operators.[3]

On appeal, the Third Circuit (Weis, J.) acknowledged that the purchased-coal clause could operate illegally and cited several of these illegal applications. The Court concluded that the clause would be illegal in situations where the addition of the penalty to the non-signatory's labor costs served as an incentive for the non-signatory to become a signatory. (App. A, 13a-15a.) Further, the Court suggested that the clause would be illegal in situa-

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2. These actions arose under ERISA and the N.L.R.A and jurisdiction in the District Court was conferred by §§ 1132 and 1145 of ERISA, 29 U.S.C. §§ 1132, 1145, 29 U.S.C. § 185 and 28 U.S.C. § 1331.

3. Two operators, Duquesne Light Company and Associated Electric Cooperative, Inc., also asserted claims that the purchased-coal clause violated Section 1 of the Sherman Act and moved for

tions where the purchased coal was not the kind the signatory had the ability to mine, for example, where the signatory purchased coal of a different grade, type or quality than its mines could produce. (App. A, 13a.) The Court also concluded that the clause would be illegal when it was applied to require signatory purchasers to serve as "bill collectors" for the Trustees with respect to vendor-signatory operators delinquent in their payments under another provision, the "produced coal" clause. (App. A, 13a.) Finally, the Court indicated that the clause would be unlawful as applied to "coal processors" because the source of the coal to be processed had no effect on the employees of the processor. (App. A, 13a.)

Nor did the Court of Appeals accept the argument that the purchased-coal clause was legal because, under the "produced coal" clause of the Agreements, signatory operators were required to make an equal payment to the Funds based on each ton of coal they produced. The Court recognized that, despite the superficial equivalence, the purchased-coal clause would penalize dealings with non-signatories, particularly where the non-signatory also contributed to its employees' own pension fund. (App. A, 12a.)

Despite its perception that the purchased-coal clause penalized dealing with non-signatories, and its acknowledgment that a prohibition of such dealing would be

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partial summary judgment. The District Court denied the motion but certified for interlocutory appeal under 12 U.S.C. § 1292(b) the question whether the *per se* rule of liability applied to the antitrust claims. The Court of Appeals accepted certification, but did not address the antitrust issues on appeal, ruling instead that resolution of the labor issues may moot the antitrust claims. As the Court of Appeals had not considered the antitrust issues, Duquesne and Associated Electric do not request in this petition that certiorari be granted with respect to the antitrust issues.

illegal under Section 8(e), (App. A, 10a.), the Court of Appeals held that the purchased-coal clause did not violate Section 8(e) as a matter of law. Instead, the Court held that, with respect to each specific application of the clause, i.e., each coal purchase transaction, there must be an in-depth factual inquiry into the circumstances affecting the purchase. The Court held that this inquiry was necessary to determine whether the clause was legal in each application as a "surrogate" for a lawful "union standards" or "work preservation" clause or whether that application of the clause had an illegal "secondary" effect.

REASONS FOR GRANTING THE WRIT

I. The Legality Under Section 8(e) Of A Labor Agreement Provision That Freely Allows Dealings Between Union Signatories But Penalizes Every Dealing Between A Signatory And A Non-Signatory Is An Important Unsettled Issue Of National Labor Policy.

The Third Circuit's refusal to hold the purchased-coal clause illegal *per se* raises a fundamental question of statutory interpretation under Section 8(e), and a question of first impression in this Court. The question is whether in every case a trial is necessary to determine the legality of a clause that on its face bespeaks a secondary object of the union by requiring a signatory employer to discriminate in dealings with other employers solely on the basis of union-signatory status.

This Court has held that Section 8(e) prohibits labor agreement provisions tactically directed toward involving a neutral employer in a labor dispute not its own. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 623-625 (1967); *Kaiser Steel*, 455

U.S. at 84. Any labor agreement provision, such as the purchased-coal clause, that places a fixed and unconditional penalty on all dealings between a signatory employer and a non-signatory employer, while freely permitting dealings between signatories, has the inherent object of involving the neutral signatory in the union's disputes with non-signatories.

The Third Circuit erred because it applied an incorrect standard of legality. The Court held that a clause is not illegal *per se* unless it is "secondary in [its] purpose as well as [its] result." (App. A, 11a.) The decisions of this Court concerning the history, scope and purpose of Section 8(e) make clear, however, that a clause is illegal if *an object* of the clause is illegal, regardless of the union's other lawful objects or the effects of the clause in application.

Section 8(e) of the N.L.R.A. by its terms prohibits an employer and a union from entering into any agreement to cease doing business with another person:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter, containing such an agreement shall be to such extent unenforcible [sic] and void . . ..

Analyzing Section 8(e) in *National Woodwork*, this Court followed its prior decision under Section 8(b)(4)(A) in *NLRB v. Denver Building and Construc-*

tion Trades Council, 341 U.S. 675 (1951). It held that, despite its literal wording, Section 8(e) only prohibited "secondary" labor agreements that involve a neutral signatory in the union's disputes elsewhere, and did not prohibit "primary" agreements directed only at preserving the work opportunities of the signatory's employees.

This Court reasoned in *National Woodwork* that since Section 8(e) was enacted in 1959 to close a loophole in Section 8(b)(4)(A) of the 1947 Taft-Hartley Amendments to the N.L.R.A., it should be interpreted consistently with Section 8(b)(4)(A). This Court held that Section 8(b)(4)(A) is crucial as to the scope of Section 8(e). 386 U.S. at 624.

For over three decades, a cardinal principle under Section 8(b)(4)(A) and its successor, Section 8(b)(4)(B)[4] has been that union conduct is unlawful if *an* object of that conduct is to involve a neutral employer in a labor dispute not its own. *Denver Building Trades*, 341 U.S. 675, 689 (1951); *NLRB v. Pipefitters Local Union No. 638*, 429 U.S. 507, 530 n.17 (1977), *citing Riverton Coal Company v. UMWA*, 453 F.2d 1035 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972).

Under *National Woodwork* the rule of *Denver Building Trades* is equally applicable to Section 8(e). Thus, a labor agreement provision is unlawful under Section 8(e) if *an* object of the provision is to involve the neutral signatory in the union's dispute, actual or potential, with another employer.[5]

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4. Section 8(b)(4)(A) was recodified as Section 8(b)(4)(B) when Section 8(e) was enacted in 1959.

5. The language and legislative history of Section 8(e) indicate that the *per se* rule of *Denver Building Trades* is, if anything, even more applicable to Section 8(e) than to 8(b)(4). Section 8(e) states

Both the Court of Appeals for the Ninth Circuit and the National Labor Relations Board have applied the principle of *Denver Building Trades* to hold union signatory clauses illegal *per se* under Section 8(e). *Pacific Northwest Chapter of Associated Builders v. NLRB*, 654 F.2d 1301, 1308 (9th Cir. 1981), *aff'd. in relevant part sub nom. Woelke & Romero Framing Inc. v. NLRB*, 456 U.S. 645, *reh. denied*, 459 U.S. 899 (1982); *General Longshore Workers, ILA Local 1418 (New Orleans Steamship Association)*, 235 N.L.R.B. 161 (1978).

In *Pacific Northwest* the Ninth Circuit ruled that a clause in a labor agreement that prohibited an employer from subcontracting any work at the jobsite to anyone who did not have an agreement with the union manifested an unlawful secondary object, and that it did not matter whether the clause had other lawful objects:

> The union's further contention that work preservation for the employees of each contractor was one of the objectives underlying the union subcontracting clause, does not compel us to alter our conclusion. Regardless of the union's other objectives, if "*an object* of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *National Maritime Union*, 196 N.L.R.B. 1100, 1101 (1972), *enforced*, 486 F.2d

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that it is illegal to *enter into* an agreement prohibited by 8(e). The legislative history of Section 8(e) confirms that the "enter into" language was intentionally adopted by Congress to make clear that a "hot cargo" agreement was unlawful from its inception. *See Teamsters Local 210 (American Feed Co.)*, 133 N.L.R.B. 214, 216 (1961). As Senator Barry Goldwater, one of the original sponsors of the bill that became Section 8(e) stated: "This means that such contractual clauses are *per se* illegal. It is unlawful for either party even to execute such an agreement. . . ." National Labor Relations Board, 2 Legislative History of Labor Management Reporting and Disclosure Act of 1959, at 1857.

> 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974) (emphasis supplied).

654 F.2d at 1308.

In *New Orleans Steamship Association*, the N.L.R.B. explicitly applied the rule of *Denver Building Trades* to invalidate a clause that, like the purchased-coal clause, freely permitted dealings between signatories, but penalized every dealing between a signatory employer and a non-signatory employer. The N.L.R.B. held that "[c]onduct (or an agreement) aimed in part at an unlawful secondary objective does not escape the statutory interdiction simply because it may also serve a primary purpose." 235 N.L.R.B. at 166.[6]

The N.L.R.B. adopted the opinion of the Administrative Law Judge who reasoned that the union's secondary object was revealed by the terms of the clause:

> Had the contracting parties made the lighter royalty requirement applicable to *all* Lash/Seabee lighter cargo of the same class, without hinging it on whether or not the cargo was handled by ILA labor, I would have had little hesitation in concluding that the clause was primary in nature in *all* its aspects—

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6. The Board's decision in *New Orleans Steamship Associates* is consistent with its rule that an unambiguous clause is to be tested by its terms. If an unambiguous clause, such as the purchased-coal clause, by its terms manifests a secondary object, it is irrelevant whether this secondary object was actually "intended," *UMWA Local 1854 (Amax Coal Company)*, 238 N.L.R.B. 1583, 1626 (1978) *aff'd* 614 F.2d 872 (3rd Cir. 1980), *rev'd on other grounds* 453 U.S. 322 (1981), or whether the clause was applied in an unlawful manner, *Bricklayers Local No. 2*, 224 N.L.R.B. 1021, 1025 (1976), *enf'd sub nom., Bricklayers & Stone Masons Union v. NLRB*, 562 F.2d 772 (D.C. Cir, 1977).

> and this even though the royalty requirement would have had the incidental effect of imposing an added financial burden on Lash/Seabee shipping transactions at non-ILA as well as ILA ports.
>
> But that is not the situation here. As fashioned, the royalty clause assesses a $2-a-ton royalty on Lash/Seabee cargo loaded or unloaded at any United States port by "other than ILA labor," but at the same time exempts like cargo from assessment if loaded or unloaded by ILA members. The clause thus reflects on its face that it is aimed at a broader or at least an added objective. . . .

Id.

As the N.L.R.B. recognized in *New Orleans Steamship Association*, a fixed penalty provision is in reality a union signatory clause. A "classic" union signatory clause, which is illegal *per se*, *prohibits* all dealings with non-signatories. The only difference between a classic union signatory clause and a fixed penalty provision is that a fixed penalty provision *inhibits* all dealings with non-signatories.

This difference does not make a fixed penalty clause less illegal under Section 8(e). The central evil of a union signatory clause is that it requires signatories to discriminate in their dealings on the basis of union-status. This union-status discrimination, whether it is a prohibition or an inhibition, necessarily has an object of involving the neutral signatory in the union's disputes with non-signatories. Such a clause by its terms exceeds the limits of a lawful "union standards" or "work preservation" clause. Under the "an object" standard of *Denver Building Trades*, a union-status based provision is illegal *per se*.

In the present case, however, the Third Circuit adopted a radically different approach. The Third Circuit recognized that the purchased-coal clause requires a signatory to discriminate in its dealings on the basis of union-status. The Third Circuit also recognized that this discrimination would be unlawful in many of the foreseeable applications of the clause. Nevertheless, it refused to hold the clause illegal *per se*.

Instead, the Third Circuit adopted a rule that will require lengthy trials to separate the lawful and unlawful applications of the clause. This Court should review the Third Circuit's decision, to clarify that the rule of *Denver Building Trades* applies to Section 8(e) and that its application requires that a union signatory clause such as the purchased-coal clause be held illegal *per se*.

A bright line rule that fixed penalty clauses are illegal provides the certainty essential to peaceful collective bargaining, the favored national policy of labor dispute resolution. By contrast, the Third Circuit's decision blesses a new category of provisions that are neither lawful nor unlawful *ab initio*, and whose legality can only be determined through painstaking judicial examination of each subsequent application of the provision.

The Third Circuit's approach is much more than impractical. The cost of litigating each application of a fixed penalty provision will inevitably force many signatory employers to compromise or capitulate regardless of the facts. Under the Third Circuit's decision, a union will be able to achieve through forced "voluntary" acquiescence the secondary objects it could not achieve by a clause confined only to primary objects, as permitted by *Denver Building Trades*. This result would be particularly ironic, because, as this Court held in *National*

Woodwork, Section 8(e) was enacted by Congress to preclude exactly such coerced "voluntary" submission to union demands 386 U.S. at 634.[7]

In sum, the legality of a labor agreement provision that freely permits dealings between signatories, but places a fixed penalty on each transaction between a signatory employer and a non-signatory employer, raises a fundamental question of statutory interpretation under Section 8(e). The Third Circuit's decision that the purchased-coal clause is not illegal *per se* is inconsistent with the decisions of this Court concerning the history, scope and purpose of Section 8(e), with the decisions of the lower federal courts and the N.L.R.B., and with considerations of national labor policy.

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7. As the UMWA demonstrated in the present case, any powerful union with a pension plan may magnify the pressure on employers to surrender to secondary union objects. The UMWA has made the purchased-coal clause penalty a "contribution" to the UMWA pension funds. Any operator choosing to fight, to try and prove that the clause was illegally applied, must confront the risk of punitive interest rates and liquidated damages imposed by ERISA on "delinquent" contributors. 29 U.S.C. 1132, 1145.

II. The Enforceability Of The Purchased-Coal Clause Is An Important Issue That Has Plagued The Coal Industry Nationwide For More Than 20 Years, Resulting In Irreconcilable Decisions By The Lower Federal Courts And By The National Labor Relations Board And Creating Continuing Uncertainty And Unrest In Labor Relations In The Coal Industry.

The purchased-coal clause and its antecedents have been the subject of litigation for over twenty years. *Raymond O. Lewis*, 144 N.L.R.B. 228 (1963); *Raymond O. Lewis*, 148 N.L.R.B. 249 (1964); *Lewis v. NLRB*, 350 F.2d 801 (D.C. Cir. 1965); *UMWA v. NLRB*, 399 F.2d 977 (D.C. Cir. 1968); *W. A. Boyle*, 179 N.L.R.B. 479 (1969), *appeal dismissed*, 468 F.2d 1139 (D.C. Cir. 1972); *UMWA (Dixie Mining Co.)*, 188 N.L.R.B. 753 (1971); *Riverton Coal Company v. UMWA*, *supra*; *United States Steel Corp. v. UMWA*, C.A. No. 75-1966 (D.D.C.) (filed October 5, 1977); *Local Union 6046, UMWA (Plateau Coal Sales, Inc*, NLRB Case Nos. 9-CC-1161-1-2-3 (Filed February 4, 1982); *Kaiser Steel Corp. v. Mullins*, *supra*.

This long and tortuous path of litigation has not led to a resolution of the legality of the UMWA's efforts to prevent or inhibit signatories from purchasing non-UMWA coal. Instead, this litigation has yielded a series of conflicting decisions that have created uncertainty and longstanding unrest in the coal industry.

The N.L.R.B. first held that the purchased-coal clause was unlawful, *Raymond O. Lewis*, 148 N.L.R.B. 249 (1964). On appeal, the District of Columbia Circuit reversed the Board's decision and remanded the case to the Board to determine whether the clause was lawful as a "surrogate union standards clause." *UMWA v. NLRB*, 399 F.2d 977 (D.C. Cir. 1968).

On remand, the Administrative Law Judge again held the clause illegal. Finally, after a change of membership, the Board reversed itself by a 3-2 vote and held that the clause was lawful. *UMWA (Dixie Mining Co.)*, 188 N.L.R.B. 753 (1971). The Board reasoned in *Dixie Mining* that, even though the purchased-coal clause penalty applied indiscriminately to all purchases of non-union coal, the clause generally functioned as a "surrogate union standards clause" that served to eliminate the differential between signatory and non-signatory labor standards. It did not discuss the rule of *Denver Building Trades Council, supra.*

In *Riverton Coal Company v. UMWA, supra*, the Court of Appeals for the Sixth Circuit held that the clause was illegal. In so holding the Court explicitly rejected the Board's decision in *Dixie Mining* and approved the Board and ALJ decisions holding the clause illegal. 453 F.2d at 1041.

Since *Riverton*, the N.L.R.B. has indicated that it no longer accepts the reasoning of its *Dixie Mining* decision. In *New Orleans Steamship Association*, the Board effectively "distinguished" *Dixie Mining* out of existence by declining to apply it to a clause that also placed a fixed penalty on all dealings between signatories and non-signatories. However, neither the N.L.R.B. nor any court has provided a definitive resolution of the conflict between *Riverton* and *Dixie Mining* as it affects labor relations in the coal industry.

The multidistrict litigation in the Third Circuit, made possible by this Court's decision in *Kaiser*, should have provided this final resolution. Instead, the Third Circuit rejected both *Riverton* and *Dixie Mining* and held that there must be individualized fact-finding with

respect to every past and future application of the clause.[8] This was a result that *none* of the parties advocated in either the District Court or the Court of Appeals. Rather than ending the twenty year conflict over the legality of the purchased-coal clause, the Third Circuit's decision can only serve to expand and prolong this controversy for as long as the clause remains in force.

This Court has recently taken the opportunity to consider again the "Rules on Containers," a labor agreement that raises a related "secondary boycott" issue that has been the subject of years of litigation in the shipping and transportation industries. *NLRB v. International Longshoremen's Association, AFL-CIO*, 734 F.2d 966 (4th Cir. 1984), *cert. granted*, 105 S.Ct. 955 (1984), (No. 84-861, 1984 Term). This petition provides a similar opportunity for this Court to clarify another important aspect of the secondary boycott provisions of the N.L.R.A., and to resolve, once and for all, a question of fundamental importance in the national bituminous coal industry.

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8. While the fact that there was a trial in *Riverton* makes it difficult to determine whether there is an absolute conflict between *Riverton* and the present case, it is clear that the Sixth Circuit in *Riverton* and the Third Circuit in the present case adopted fundamentally different approaches to analyzing the purchased-coal clause. The root of this conflict is that the Third Circuit, unlike the Sixth Circuit in *Riverton*, refused to completely reject the *Dixie Mining* argument that the clause might serve as a "surrogate union standard clause."

III. The Decision Of The Court Of Appeals Is Unprecedented In Approving A Penalty Clause In A National Labor Agreement To Be Applied Under A Standard That Permits Legality To Flicker Depending Upon Factors Unknown And Unknowable At The Time Of Application.

Finally petitioners ask this Court to review this decision now because the cost of applying it will be staggering for the courts and all parties concerned. In addition, the analytical flaws of the Third Circuit's decision and the difficulty as a practical matter of applying it ensure that there will be a multiplicity of future appeals.

The heart of the Third Circuit's decision is its acceptance of the argument that the purchased-coal clause may be legal in some applications, namely where the clause appears to serve as a "surrogate union standards clause" that does no more than reduce the incentive to subcontract to employers with lower labor standards. As the Third Circuit acknowledged, however, the clause by its terms goes much further.

The clause on its face applies to purchases from non-signatories whose wages and benefits are comparable to UMWA wages and benefits. It applies to purchases of coal that do not threaten work opportunities of the signatory's employees, such as purchases of coal a signatory cannot produce because the signatory is producing to full capacity, because its mines do not contain the type of coal the signatory needs, or in the case of coal processors, because the signatory does not produce any coal at all. It applies to purchases from a signatory who has not contributed to the Funds on the coal it produced, involving the purchaser in the dispute of the union with another employer. The Third Circuit's decision is that

there must be a trial to separate these, and any other, unlawful applications from "lawful" applications.

The cost of this undertaking is incalculable. Further, apparently by design, the Third Circuit provided little guidance as to even the basic procedure on remand. Instead, the Court set forth several "preliminary observations" and stated its belief that "some general standards may be developed with experience." (App. A, 12a, 16a.)

Considering the tens of millions of dollars involved in the pending litigation, and potentially at risk under the current Agreement, the "experience" will be gained at high cost, in extended litigation and further appeals. For example, while the Court identified several categories of illegal applications, it did not specify what either the operators or the Trustees will be required or permitted to prove at trial with respect to these applications. In addition, the Court did not indicate whether there are other categorically unlawful applications.

The Third Circuit also indicated that a critical aspect of the individualized fact-finding will in some cases be a comparison, transaction-by-transaction, of the labor costs of individual signatory and non-signatory producers. The Court stated in footnote 8 that this labor cost comparison must be adjusted to account for differences in productivity. The productivity adjustment in footnote 8, however, is incomprehensible. Because this productivity adjustment seems essential to the Third Circuit's theory of transactional analysis, there will undoubtedly be additional litigation over its meaning in both the trial and appellate courts.

Finally, even in cases where the clause is held "lawful," the legality of these applications of the clause will be fortuitous. The individual signatory and non-signatory

labor costs essential to the Court's transaction-by-transaction "surrogate union standards" analysis were unknown and unknowable at the time the Agreements were executed. These costs were and will be unknowable at the time of each signatory purchase from a non-signatory.

Implementation of the Third Circuit's decision will not isolate the union's unlawful objects. The union's "subjective purpose" will be no more or less "secondary" in a lawful transaction than in an unlawful transaction. Instead, as the operators have always contended, the UMWA's illegal secondary purpose is revealed by its decision, time and time again, to adopt a clause that by its terms applies to many situations where the union has no legitimate interest. This Court should consider whether such an overbroad clause can be saved from summary invalidation by the possibility of some lawful applications.

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS

In re BITUMINOUS COAL WAGE AGREEMENTS

Appeal of TRUSTEES OF the UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, in Nos. 84-3166 & 84-3220

Appeal of INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, in Nos. 84-3167 & 84-3237

Appeal of DUQUESNE LIGHT COMPANY and Associated Electric Cooperative, Inc., in Nos. 84-3371 & 84-8067

Nos. 84-3166, 84-3167, 84-3220, 84-3237, 84-3371 and 84-8067

United States Court of Appeals, Third Circuit

Argued Nov. 26, 1984

Decided Feb. 27, 1985

Rehearing and Rehearing In Banc in Nos. 84-3166, 84-3167, 84-3220, 84-3237 and 84-3371 Denied April 1, 1985

Before HUNTER AND WEIS, *Circuit Judges, and* THOMPSON, *District Judge.**

**The Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation*

OPINION OF THE COURT

WEIS, *Circuit Judge.*

The United Mine Workers Union has incorporated a "purchased-coal" clause in its collective bargaining agreements. By its terms, a signatory employer must contribute to the Union Health and Retirement Funds an equal amount per ton of coal whether it mines the mineral or purchases it from a non-signatory. The district court enjoined enforcement of the clause because it was union signatory on its face. However, we conclude that the legality of the provision must be resolved in the circumstances affecting each purchase. Accordingly, we will vacate the summary judgment in favor of the employers and remand. Because resolution of these issues may moot the employers' antitrust claims, we will remand them as well.

This litigation consists of twenty-four cases that the Judicial Panel on Multidistrict Litigation consolidated and transferred to the district court for pre-trial proceedings. Common to all is the legality of a clause in three successive multi-employer collective bargaining agreements between the United Mine Workers and the Bituminous Coal Operators Association. In most of the suits the Trustees of the UMW Health and Retirement Funds seek to recover allegedly delinquent contributions from signatory employers, who in turn defend on the basis that the clause violates § 8(e) of the National Labor Relations Act. 29 U.S.C. § 158(e) (1982). Several employers brought other complaints seeking either declaratory relief or damages under the labor and antitrust laws.

The district court held that on its face the purchased-coal clause violated § 8(e) and entered summary judgment against the trustees. Having enjoined enforcement of the clause, the court did not consider claims for injunc-

tive relief under the Sherman Act. However, in two case employers sought antitrust damages. In those suits th court concluded that the rule of reason applied, and tha unresolved questions of fact precluded summary judg ment.[1] Because the orders in these latter two cases wer not final, the court certified for appeal under 28 U.S.C. 1292(b) the question whether the per se rule applied t the antitrust claims.

In their collective bargaining agreements of 197 1978, and 1981, the United Mine Workers and the Bitum nous Coal Operators Association included Articl XX(d)(1)(v), which is now familiar as the purchased-coa clause. It reads in pertinent part:

> "... each signatory employer shall ... contrib ute to the Trusts ... in the amounts shown belo based on cents per ton ... of bituminous coal afte production by another operator, procured or acquire by such Employer for use or sale on which contr butions to the appropriate Trusts as provided for i this Article have not been made ...."

When read in conjunction with the "produced-coa clause",[2] the effect is to require an employer-signatory t pay an identical contribution to the Health and Retire ment Funds whether the coal was extracted from th employer's mines or was bought from an operator tha had not already paid the contribution on the assesse tonnage.

After the suits were consolidated but before disco ery commenced, a number of the employers filed motion

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1. The opinion of the district court is reported at 580 F. Supp 670 (W.D. Pa. 1984).

2. "... each signatory Employer engaged in the production c coal shall contribute to the Trusts ... the amounts specified belo based on cents per ton on each ton of ... bituminous coal produced b such Employer for use or sale ...." Article XX(d)(1).

for summary judgment, contending that the clause on its face violated § 8(e) of the NLRA. The district court stayed discovery pending disposition of the motions. In opposition to the motions, the union and trustees submitted evidence to show that as a result of the negotiated wage rates for union members, the signatory-employers had higher labor costs than did non-signatory employers. Consequently, unless the wage differential was offset, signatory operators would have an incentive to meet at least part of their customers' needs by purchasing coal at favorable prices from non-signatories.

The union saw this practice as a threat to the jobs of its members and, to discourage subcontracting, the purchased-coal clause was devised to narrow the gap between the labor costs of signatories and non-signatories—generally, nonunion operators.[3] As such, the trustees and the union contend that the provision is a union standards or work preservation clause.

The employers, however, characterize the clause as "union signatory," reasoning that it imposed a "penalty" or "tax" on coal purchased from non-signatories. From that standpoint, the employers assert that the clause was intended to encourage or compel other operators to enter into collective bargaining agreements with the UMW.

The employers point out that their signatory group includes not only commercial operators who sell the tonnage they produce but "captive" mines such as utilities which consume all of their own output. In addition, some of the signatories are "preparers" who do not mine but simply process supplies bought from others.

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3. The parties draw the distinction in this case between signatories and non-signatories. However, not all non-signatories are non-union. Nevertheless, we shall on occasion refer to all non-signatories as non-union.

The district court found that the clause was not within the "union standards" definition because the contribution was imposed indiscriminately on a non-signatory "without taking into account that the non-union operator may have the same or better working conditions." 580 F. Supp. at 681. The "work preservation" label was rejected because the clause was intended to preserve the "work of the entire multi-employer bargaining unit." "The impact of the purchased-coal clause reaches beyond any case-defined 'work unit,' i.e., single employer, and seeks to benefit all Union members." Accordingly, the court concluded that the clause was not "addressed to the labor relations of the contracting employer vis-a-vis his own employees" and hence was an illegal "union signatory" provision. 580 F. Supp. at 680.

In the antitrust damage suits, the court concluded that the purchased-coal clause was not "a classic group boycott [and] therefore [not] a per se violation." It was not "an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." 580 F. Supp. at 686. Finding insufficient facts in the record to conduct a rule of reason analysis, the court refused to grant summary judgment in favor of the employers on their antitrust claims. All parties have appealed.

The purchased-coal clause has a lengthy history. A predecessor, the protective wage clause, prohibited signatories from purchasing from operators whose employees mined coal under conditions less favorable than those in the 1958 agreement. After the National Labor Relations Board held the clause invalid, *Raymond O. Lewis*, 144 NLRB 228 (1963), the Court of Appeals for the District of Columbia vacated and remanded, *Lewis v. NLRB*,

350 F.2d 801 (D.C. Cir. 1965). About four years later, the Board upheld the clause. *W.A. Boyle*, 179 NLRB 479 (1969), *appeal dismissed*, 468 F.2d 1139 (D.C. Cir. 1972). The protective wage clause also figured prominently in a number of antitrust suits. *See Ramsey v. United Mine Workers*, 401 U.S. 302 (1971); *South East Coal Co. v. Consolidated Coal Company*, 434 F.2d 767 (6th Cir.), *cert. denied*, 402 U.S. 983 (1971); *Tennessee Consolidated Coal Co. v. United Mine Workers*, 416 F.2d 1192 (6th Cir.), *cert. denied*, 397 U.S. 964 (1970).

In the meantime, the parties had substituted the "80-cent clause." It required a signatory to pay 80 cents per ton on coal purchased from a non-signatory, but only 40 cents if the source was a signatory. The Board held this clause violated § 8(e) only to be reversed once again by the Court of Appeals. *UMWA v. NLRB*, 399 F.2d 977 (D.C. Cir. 1968). On remand, the Board found the clause to be valid. *UMWA (Dixie Mining)*, 188 NLRB 753 (1971).

In an unrelated suit brought by an operator, the Court of Appeals for the Sixth Circuit found the 80-cent clause invalid. *Riverton Coal Co. v. UMWA*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972). Following that decision, the present purchased-coal clause was substituted.

The current clause has not been reviewed in any appellate proceeding, but did appear in the background in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). There, the Court held that an employer may raise the legality of the provision as a defense to a trustees' suit for past due contributions. The clause's validity was not an issue before the Court and was not decided.

The purchased-coal provision must be tested against the pertinent prohibitions of § 8(e):

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees to cease or refrain from . . . dealing in any of the products of any employer, or to cease doing business with any other person . . . ."

29 U.S.C. § 158(e) (1982). The Supreme Court has held that the statute reaches only "secondary" pressures, *National Woodwork Manufacturers Ass'n. v. NLRB*, 386 U.S. 612, 638 (1967). Thus, "primary" activity, such as work preservation, is not prohibited, even though secondary effects may be present.

If the purpose is to benefit the employees of the bargaining unit, the agreement is "primary" and does not run afoul of § 8(e). If, however, the aim is to put pressure on an outside employer to submit to union objectives, the provision is secondary and prohibited. *A. Duie Pyle, Inc. v. NLRB*, 383 F.2d 772 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). The issue is

> "whether the boycott was 'addressed to the labor relations of the contracting employer vis-a-vis his own employees,' *National Woodwork*, supra at 645, and is therefore primary conduct, or whether the boycott was 'tactically calculated to satisfy union objectives elsewhere', 386 U.S. at 644, in which event the boycott would be prohibited secondary activity."

NLRB v. Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local 638 (Pipefitters), 429 U.S. 507, 511 (1977). As the Court remarked, "This will not always be a simple test to apply." *National Woodwork*, 386 U.S. at 645.

Two well recognized primary provisions have emerged—work preservation and union standards clauses. If the union's objective is to retain work that is traditionally performed by employees represented by the union and also within the contracting employers' power to assign, § 8(e) is not a bar. *NLRB v. International Longshoremen's Ass'n., AFL-CIO*, 447 U.S. 490, 504 (1980). So long as the union has no forbidden secondary purpose to affect the employment relations of an outside employer, the agreement is valid even though it adversely affects the employment opportunities of non-represented workers. *Id.* at 507 n.22.

A union standards clause is designed to inhibit subcontracting of work that would otherwise be performed by members of the bargaining unit. This court described such an agreement in *A. Duie Pyle* as "the exaction of requirements designed to protect union standards against substandard competition which might be an incentive for an employer to deprive his unionized employees of work." A provision of that nature serves "a primary rather than a secondary objective, especially in light of the now prevalent view that union standards clauses are valid primary regulations." 383 F.2d at 777. Clauses "merely requiring that subcontractors observe the equivalent of union wages, hours and the like" fall within the definition of "union standards" and are "thus outside § 8(e)'s prohibitions." *Truck Drivers Union Local No. 413 v. NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

Falling on the other side of the line and violative of § 8(e) are "union signatory clauses." In *A. Duie Pyle*, we held that a collective bargaining agreement may not prohibit an employer from contracting with enterprises or individuals that are not unionized.

> "As in the case of secondary boycotts generally, a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize. Nor may it by this means seek to coerce self-employed persons to become union members."

383 F.2d at 777.

In a later case, *Amax Coal Co. v. NLRB*, 614 F.2d 872, 887 (3d Cir. 1980), *reversed on other grounds*, 453 U.S. 322 (1981), we found invalid a clause restricting *Amax*'s ability to license-out coal operations.

> "... the clause forces the licensee-employer to abide by the union recognition portion of the contract. It serves only the union's organizing interests and does not protect the Amax employees' work standards .... Amax would be obliged to discontinue the licensing agreement if the licensee ever stopped recognizing the Union...."

See also, Truck Drivers Union Local No. 413, 334 F.2d at 548. (distinction between union standards and union signatory clauses is vital).

Thus, if the collective bargaining agreement requires the employer to subcontract only with firms that observe union standards, § 8(e) has not been violated. Such a clause permissibly protects the employer's own workers since the non-union firm will not be able to offer lower prices based on sub-union wage and benefit standards. However, if an employer is prohibited from subcontracting except with unionized firms, the clause cannot be enforced, even though the employer's own workers receive the same protection afforded by a union standards provision.

The distinction between the two is based on the premise that the union signatory clause is designed to affect the labor relations of the non-union subcontractor and its employees. Thus, the interference is secondary. An argument may be made that a union standards clause has such effects to some lesser degree, but the distinction is firmly established.

With this brief exposition of the complexity surrounding the primary and secondary dichotomy under § 8(e), we turn to the clause at issue in this case. The initial question which a court must decide is whether a violation of § 8(e) appears on the face of the collective bargaining agreement. To find that the clause is prohibited, the court must determine the provision is "secondary in [its] purpose as well as [its] result." *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d at 777. That may be apparent, for example, when the clause's "necessary effect is to make the continuance of the relationship between the [signatory] employer and an independent contractor depend upon the latter's decision to become a member of the union." *Id.* at 777. In these limited circumstances a clause may be held invalid *per se*.

But it is often difficult, if not impossible, to determine from the wording of the clause the union's "tactical object," *Woodwork Manufacturer's Association*, 386 U.S. at 645, or "design," *Amax Coal*, 614 F.2d at 886. More than the document itself is generally needed for that analysis.[4] In *A. Duie Pyle* we noted that it is "undesirable to determine the conscious objective of a union in obtaining the inclusion of a challenged provision . . . on a

4. For example, the fact that work preservation aims are not apparent from a reading of the provisions does not establish that they are or are not present. The inability to discern this purpose from the clause itself does not make it violative of § 8(e).

bare stipulation of facts." 383 F.2d at 777. Moreover, e
if invalidity is not apparent because on its face the cla
seems to comply with § 8(e), an "as applied" violat
may surface after more detailed factual developme
Building Material & Constr. Teamsters Union Local
216 v. N.L.R.B., 520 F.2d 172 (D.C. Cir. 1975).

We are persuaded that the prohibited secondary
jective is not revealed by the language of the collect
bargaining agreement here, and further inquiry is n
essary. Some preliminary observations are in order.

First, nothing in the clause operates to the econo
disadvantage of a non-union producer in selling his c
to nonsignatories. Those relationships are not affecte

Second, the amount of the "contribution", "tax"
"penalty", as the parties have chosen to call the exact
payable by the signatory, is the same whether the coa
purchased or produced. On its face this appears to m
the payment non-discriminatory and thus an equal b
den on both union and non-union producers. On ref
tion, it may be appreciated that if the non-union produ
pays into an independent retirement and benefit fund
his workers, the clause will impose an additional indi
burden on each ton of coal from which the employees
the non-union producers receive no benefit.

Third, if the non-union operator's labor costs
lower than a signatory's by an amount greater than
"tax" or "penalty," then he has not been put at a c
petitive disadvantage with coal produced in a un
mine. In this instance, therefore, although the non-un
operator cannot offer as attractive a price to a signat

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5. Of course, that might not be true if a traditional union s
dards clause were in effect. If the non-union producer raises w
rates to union levels so that business may be done with signato
the additional labor cost would influence prices in sales to
signatory buyers as well.

it would still be better than that which could be presented by another signatory.

Fourth, if the gap between a non-union producer's and a signatory's labor costs is less than the amount of the "penalty," then the differential might create pressure to become a signatory and thus avoid the burden of the "double payment" for employee health and retirement benefits.

Fifth, if the coal purchased is not the kind the signatory has the ability to mine,[6] questions arise about whether traditional work of the bargaining unit is at risk, the criterion that justifies the legality of work preservation rules. *See, e.g., Building Material & Constr. Teamsters Union Local No. 216 v. N.L.R.B.*, 520 F.2d 172 (D.C. Cir. 1975).

Sixth, by emphasizing that the exaction is due when it has not previously been paid, the trustees may use the clause to recover from a conscientious signatory purchaser past due amounts attributable to a delinquent producer. In that situation, the provision may be used for the prohibited ulterior union purpose of "bill collecting" by the trustees. *See Griffith Company v. NLRB*, 545 F.2d 1194 (9th Cir. 1977).

These factors are variables which may be present in some cases but not in others. Indeed, some of the signatories are preparers who produce no coal of their own and whose own employees' income has no relationship to the source from which the coal is secured. The effects of this particular clause will not be uniform and the primary-

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6. The industry distinguishes between "supplemental" coal which differs from the grade, type, and quality an operator produces, and "substitute" coal. The latter is the equivalent of produced coal and may be sold in its place. The work preservation justification may differ in the two situations. *See Lewis v. NLRB*, 350 F.2d 801, 802 (D.C. Cir. 1965).

secondary distinction so important to the resolution
8(e) liability is dependent on them.

None of these matters have been resolved on
record. The trustees and the union submitted evidenc
the district court that, by and large, the gap between
labor cost of signatories and non-union producers
ceeds the amount of the purchased-coal clause exact
That fact, however, has not been conceded by the sign
ries nor judicially established.[7] The other variables
we have listed also require development, as they appl
a particular case.

In some instances, the use of the clause will not b
inducement to a non-union producer to join the union
may make it less desirable for a signatory to supply
customers with purchased rather than produced coal
other situations, the economic factors may combine
exert substantial pressure on a non-union produce
recognize the union.[8] There may be other factual setti
in which none of the justifications for work preserva
or union standards exist, and only secondary pressu
are present. For these reasons, the signatories are
error in pressing for a "per se" or facial test, rather t

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7. In *Kaiser Steel v. Mullins*, the Supreme Court noted the
signatory's contention that its employees' wages and benefits
equal or superior to those of the United Mine Workers. In that cir
stance, as the Court noted, a non-UMW employer would be requir
lower its price in order to be competitive with a UMW producer
the purchased coal clause was applied. It is in that context that
court observed that if the clause is illegal, "it is because of
financial burden which the agreement attached to purchase of
from non-UMW producers even though they may have contribute
other employee welfare funds." 455 U.S. at 79.

8. The method used to calculate the differential must insure
the non-union operator is not penalized for greater productivity.
example,

an "as applied" rationale. As we see it, this is not an "all or nothing" situation.

The signatory employers rely heavily on *Riverton Coal Co. v. UMW*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972), but in part that decision is actually contrary to their position of facial invalidity. In that case, the district court found on the basis of the evidence presented at trial, that the union designed the 80-cent clause so that the signatory, Riverton Coal, would pressure its affiliates to recognize the UMW. Accordingly, the secondary purpose was established. To that

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to avoid a disadvantage to an efficient producer, the time it takes the union miner to produce one ton of coal may be assumed to be the production rate of both the parties. When that rate per hour is multiplied by the actual hourly labor costs of the union and non-union producers the two resulting labor costs per ton are compared to measure the "gap."

If as the union contends the "gap" is greater than the tax, the purchased-coal clause operates to affect only the labor costs and more importantly only to the extent that the non-union scale is below union standards. Conversely, if the tax is greater than the gap, the clause is impermissible because the wage differential has been exceeded.

If a non-union mine is less efficient, each operator's labor cost per ton could be calculated by using the time it actually takes the union and non-union miner to produce one ton. Comparing actual costs per ton is necessary because to lower the union operator's production to that of the non-union operator would increase the gap based on the inefficiency of the non-union operator, a result the union has disclaimed and which serves no legitimate purpose under § 8(e).

We do not mandate the use of these formulas but simply point out that they are examples of methods which may be used to meet the objective of relating labor costs to the per ton fund contribution to demonstrate the economic effect of the purchased-coal clause.

extent, the *Riverton* decision is not inconsistent with t
rationale we adopt here.[9]

In sum, we believe that the legality of the clau
must be decided on the facts applicable to each signato
Kaiser Steel v. Mullins points the way in holding that
signatory may raise the defense of illegality in a suit f
contributions by the trustee.

It bears mentioning that the obligation to make co
tributions is that of each individual signatory. It is n
disputed that the Fund's auditors require each signato
to segregate contributions for purchased coal from t
amount due on its own production. Since the collectio
are on an individual signatory basis, the validity of tho
contributions may likewise be determined on the circu
stances present in each case. We recognize that the
may be differing results as well when a signatory pu
chases from several sources and therefore careful a
counting may be required. This may be a burden for bo
signatories and the trustees but we believe that so
general standards may be developed with experienc
Consideration of the various concerns we have listed w
necessarily focus on the interests of the employees of t
individual signatory and not those of all other signat
ries.[10]

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9. We are not persuaded by the dictum in that case that
primary objective had been shown because Riverton could com
with the clause by shutting down its mines and supplying its custo
ers only with purchased coal. That same rationale would apply t
valid union standards clause.

10. On this basis, also, the uneasiness expressed by the distr
court—that the work preservation aspects of the clause are not li
ited to the individual employees—is dissipated.

Consequently, whether the clause is valid as a surrogate union standards or work preservation clause, or whether it contravenes § 8(e) as a union signatory clause must depend on individualized fact finding. Because that was not done in this case, the summary judgment must be vacated.

The outcome of the individual cases may moot the antitrust claims. We therefore do not meet those issues.

Accordingly, the judgments of the district court will be vacated and the cases will be remanded for proceedings consistent with this opinion.

APPENDIX B

OPINION OF THE DISTRICT COURT

In re BITUMINOUS COAL WAGE AGREEMENTS LITIGATION

Misc. No. 9604.
MDL 536.

United States District Court,
W. D. Pennsylvania

Feb. 21, 1984

OPINION

MANSMANN, *District Judge.*

This matter comes before this Court on Motions fo Summary Judgment filed by certain Plaintiffs[1] an Defendants[2] in this multidistrict litigation.[3]

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1. Duquesne Light Company ("Duquesne"), C.A. No. 81-87 Harrison Combs, John J. O'Connell and Paul R. Dean, as Trustees the United Mine Workers of America Health and Retirement Fund C.A. No. 83-0069; Union Carbide Corporation ("Union Carbide"), C.A No. 83-2619; Associated Electric Cooperative, Inc. ("Associated" C.A. No. 83-2626; Royalty Smokeless Coal Company, Inc. ("Royalty" C.A. No. 83-3211; Virginia Crews Coal Company, Inc. ("Virgini Crews"), C.A. No. 83-3212; and Shannon Pocahontas Mining Com pany, ("Shannon"), C.A. No. 83-3213. With the exception of th Trustees in C.A. No. 83-0069, all moving Plaintiffs are Industry mem bers.

2. Old Home Manor, Inc. ("Old Home"), C.A. No. 79-110 Luzerne Coal Corporation, a corporation ("Luzerne"), C.A. No. 8 1804; Duquesne, C.A. No. 81-2255; Gilbert Fuel Co. and LaLuz Ohi Inc. individually d/b/a Muskingum Mines Joint Venture, a partne ship ("Muskingum"), C.A. No. 83-0059; Lakeside Coal C ("Lakeside") and Kinlock Coals, Inc. ("Kinlock"), C.A. No. 83-006 Pulltight Coal, Inc., a corporation ("Pulltight"), C.A. No. 83-006 Reitz Coal Company ("Reitz"), and Doe Valley Coal Compan ("Doe"), C.A. No. 83-0067; Reitz, C.A. No. 83-0068; Consolidation Co Company ("Consolidation"), C.A. No. 83-0069; Associated, C.A. N 83-2060; United States Fuel Company ("U.S. Fuel"), C.A. No. 83-245 West Newton Coal Logistics Company, a corporation ("West New ton"), C.A. No. 83-2761; and Union Carbide, C.A. No. 84-146.

3. Pursuant to the January 10, 1983 Order of the Judicial Pan on Multidistrict Litigation, fifteen actions pending in five district

In thirteen of the nineteen cases before this Court,[4] the Plaintiffs are the Trustees ("Trustees") of various pension plans (the "Funds") established by the United Mine Workers of America (the "Union") and have commenced these actions against various coal-producing and/or utilizing corporations (the "Industry") to recover claimed deficiencies in contributions to the Funds. Additionally, in some of these cases, the Union is a Plaintiff-intervenor[5] or a Counterclaim Defendant.[6] The Industry Defendants resisted these claims by asserting, *inter alia*, in their Counterclaims and/or Answers that the provision of the collective bargaining agreements under which the Funds are sought contains a clause which is illegal and unenforceable as it is violative of § 1 of the Sherman Act (15 U.S.C. § 1) and/or § 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)).

Article XX, Section (d)(1)(v) of the National Bituminous Coal Wage Agreements ("Wage Agreement") of

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were centralized for coordinated or consolidated pretrial proceedings. (Eleven cases were transferred from other districts and four were already venued in the Western District of Pennsylvania.) Thereafter, certain cases were discontinued and others were added to those already before this Court, making the current total twenty-one. (Of these cases, nineteen are currently before the Court on Motions for Summary Judgment. Those Industry members which have not moved are Douglas Pocahontas Coal Company, a corporation, C.A. No. 83-0063; and Metco Mining Corporation, a corporation, C.A. No. 83-0064.)

4. C.A. No. 79-1100 (Old Home); C.A. No. 80-1804 (Luzerne); C.A. No. 81-2255 (Duquesne); C.A. No. 83-0059 (Muskingum); C.A. No. 83-0060 (Lakeside and Kinlock); C.A. No. 83-0061 (Pulltight); C.A. No. 83-0067 (Reitz and Doe); C.A. No. 83-0068 (Reitz); C.A. No. 83-0069 (Consolidated); C.A. No. 83-2060 (Associated); C.A. No. 83-2457 (U.S. Fuel); C.A. No. 83-2761 (West Newton) and C.A. No. 84-146 (Union Carbide). For convenience and clarity, when individual cases are mentioned in this Opinion, they shall be referred to by their civil action number and the name of the Industry member party.

5. C.A. No. 83-0067 (Reitz and Doe); C.A. No. 83-0068 (Reitz); and C.A. No. 83-0069 (Consolidated).

6. C.A. No. 83-2060 (Associated) and C.A. No. 84-146 (Union Carbide).

1974, 1978 and 1981 contains the clause which is at issu
(the "purchased-coal clause").[7] By its terms, th
purchased-coal clause sets forth, *inter alia*, that sign
tory Industry members are to contribute to the Fund
whenever coal is purchased for sale or use by the sign
tory "on which contributions to the appropriate Trus
. . . have not been made."

In the remaining six cases before this Court,[8] th
Plaintiffs are various members of the Industry whic
have commenced suits against the Trustees and the U
ion, alleging that the purchased-coal clause is illegal an
unenforceable as it is violative of 15 U.S.C. § 1 and
U.S.C. § 158(e). The Defendants in all six of these case
are both the Trustees and the Union.

In each of the cases under consideration, th
movants are the Industry members (with one excep
tion).[9] Every Industry movant has applied to this Cou
for summary judgment contending, *inter alia*, that th
purchased-coal clauses in the Wage Agreements of 197
1978 and/or 1981 are "union signatory" agreements an
illegal under 29 U.S.C. § 158(e).[10] Some Industr

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7. The purchased-coal clause of the Wage Agreements is ident
cal for the years 1974, 1978 and 1981 and is set forth *infra*.

8. C.A. No. 81-870 (Duquesne); C.A. No. 83-2619 (Union Ca
bide); C.A. No. 83-2626 (Associated); C.A. No. 83-3211 (Royalty); C.
No. 83-3212 (Virginia Crews); and C.A. No. 83-3213 (Shannon).

9. The Trustees in C.A. No. 83-0069 (Consolidation) have move
for summary judgment based upon their claim that Consolidatio
owes contributions to the Funds. (This motion was made prior to th
transfer of this case from the U. S. District Court for the District
Columbia pursuant to the Order of the Judicial Panel on Multi-distri
Litigation and was held in abeyance.) In that action, Consolidatio
has also moved for summary judgment.

10. Certain Industry movants have based their motion on th
ground alone: Muskingum (C.A. No. 83-0059); Lakeside and Kinclo
(C.A. No. 0060); Pulltight (C.A. No. 83-0061); and Consolidation (C.
No. 83-0069).

movants further contend that the purchased-coal clauses are *per se* violative of 15 U.S.C. § 1 as an unlawful group boycott.[11]

The Industry movants seek declaratory and injunctive relief, *i.e.*, that this Court find the purchased-coal clause to be illegal and unenforceable under 15 U.S.C. § 1 and/or 29 U.S.C. § 158(e) and that this Court permanently enjoin its enforcement. Additionally, of those movants claiming violations of 15 U.S.C. § 1 and 29 U.S.C. § 158(e) and seeking injunctive relief, some have asserted claims for damages in their Complaints or Counterclaims and have sought summary judgment as to liability only.[12]

For the reasons set forth below, the Trustees' motion for summary judgment is denied and the Industry's motions for summary judgment are granted in part and denied in part. More specifically, this Court finds the purchased-coal clause to be violative of 29 U.S.C. § 158(e) and permanently enjoins its enforcement. The Industry movants' applications for summary judgment based on this ground are granted. For the reasons set forth in the Opinion, the Industry's motions for summary judgment based upon the claimed antitrust violations are denied.

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11. Old Home (C.A. No. 79-1100); Luzerne (C.A. No. 80-1804); Duquesne (C.A. Nos. 81-870 and 81-2255); Reitz (C.A. Nos. 83-0067 and 83-0068); Doe (C.A. No. 83-0067); Associated (C.A. Nos. 83-2060 and 83-2626); U.S. Fuel (C.A. No. 83-2457); Union Carbide (C.A. Nos. 83-2619 and 84-146); West Newton (C.A. No. 83-2761); Royalty (C.A. No. 83-3211); Virginia Crews (C.A. No. 83-3212); and Shannon (C.A. No. 83-3213).

12. Duquesne (C.A. No. 81-870) and Associated (C.A. Nos. 83-2060 and 83-2626).

FACTUAL BACKGROUND

On December 6, 1974, March 27, 1978 and June 1981, the Union, the Bituminous Coal Operators' Asso ation, Inc. and others entered into collective bargaini agreements, the National Bituminous Coal Wage Agr ments of 1974,[13] 1978[14] and 1981,[15] respectively.

Included in the Wage Agreements of 1974, 1978 a 1981 is the purchased-coal clause, Article XX, secti (d)(1)(v), which provides in pertinent part as follo

> In addition to the contributions indicated abo during the life of the Agreement, each signato Employer shall, for the periods of time indicat below, contribute to the Trusts established in t Article in the amounts shown below based on ce per ton on each ton of two thousand (2,000) pou of bituminous coal after production by another op ator, procured or acquired by such Employer for u or for sale on which contributions to the appropri

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13. The Wage Agreement of 1974 is at issue in the follow cases: C.A. No. 79-1100 (Old Home); C.A. No. 80-1804 (Luzerne); C No. 81-870 (Duquesne); C.A. No. 81-2255 (Duquesne); C.A. No. 0060 (Lakeside and Kinlock); C.A. No. 83-0067 (Reitz and Doe); C No. 83-2619 (Union Carbide); and C.A. No. 84-146 (Union Carbi

14. The Wage Agreement of 1978 is at issue in the follow cases: C.A. No. 79-1100 (Old Home); C.A. No. 80-1804 (Luzerne); C No. 81-870 (Duquesne); C.A. No. 81-2255 (Duquesne); C.A. No. 0059 (Muskingum); C.A. No. 83-0060 (Lakeside and Kinlock); C.A. 83-0061 (Pulltight); C.A. No. 83-0068 (Reitz); C.A. No. 83-0069 (C solidated); C.A. No. 83-2060 (Associated); C.A. No. 83-2619 (Un Carbide); C.A. No. 83-2626 (Associated); C.A. No. 83-3211 (Royalt C.A. No. 83-3212 (Virginia Crews); C.A. No. 83-3213 (Shannon); a C.A. No. 84-146 (Union Carbide).

15. The Wage Agreement of 1981 is at issue in the follow cases: C.A. No. 83-2060 (Associated); C.A. No. 83-2457 (U.S. Fu C.A. No. 83-2619 (Union Carbide); C.A. No. 83-2626 (Associated); C No. 83-2761 (West Newton); C.A. No. 83-3211 (Royalty); C.A. 83-3212 (Virginia Crews); C.A. No. 83-3213 (Shannon); and C.A. 84-146 (Union Carbide).

> Trusts as provided for in this Article have not been made (amounts shown below include cents per hour worked contributions converted to tonnage equivalents).

Pursuant to the purchased-coal clause of the Wage Agreements of 1974, 1978 and 1981, each "Employer"[16] (Industry signatory) was required to make contributions to the Funds based on the amount of coal *produced* by the signatory. Additionally, each Industry signatory was required to make contributions to the Funds based upon the amount of coal *purchased* for sale or use by the signatory "on which contributions to the appropriate Trusts . . . have not been made."[17] Thus, any coal purchased from a non-signatory (nonunion producer) would appear to obligate the Industry signatory to contribute specified amounts to the appropriate Funds.

A common pattern emanating from each of the cases before this Court is that the Industry signatories made contributions to the Funds with respect to coal they *pro-*

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16. "Employer", as used in the 1974, 1978 and 1981 Wage Agreements, is synonymous with Industry signatory. The 1950 and 1974 Union Pension Plans administered by the Trustees were incorporated into each of the three Wage Agreements: the 1974 Wage Agreement (incorporating the 1950 and 1974 plans, effective December 6, 1974); the 1978 Wage Agreement incorporating the 1950 and 1974 plans, as amended March 27, 1978); and the 1981 Wage Agreement (incorporating the 1950 and 1974 plans, as amended June 7, 1981). Article I, section A(2) of the 1950 and 1974 Union Pension Plans provides:

> 'Employer' means an employer who is signatory to the Wage Agreement or, with respect to prior periods, was signatory to the bituminous coal wage agreement then in effect.

17. Moreover, pursuant to the terms of the 1950 and 1974 Union Pension Plans, (Article V, Section B(8)), only "Employers" were permitted to contribute to the Funds:

> Contributions to the [1950 or 1974] Pension Trust to fund the benefits under this Plan shall be paid solely by the Employers in accordance with Article XX [of the Wage Agreement in effect at the time].

duced but did not make contributions to the Funds with respect to coal which they *purchased.* The instant controversy centers entirely around this distinction as it relates to the purchased-coal clause.

These actions commonly arise under and jurisdiction is predicated upon § 301 of the Labor Management Act, 29 U.S.C. § 185[18] and §§ 502 and 515 of the Employee Retirement Income Security Act of 1974, ("ERISA") as amended, 29 U.S.C. §§ 1132[19] and 1145.[20]

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18. 29 U.S.C. § 185 reads in pertinent part as follows:

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

19. 29 U.S.C. § 1132 reads in pertinent part as follows:

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

20. 29 U.S.C. § 1145 reads as follows:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Under FED.R.CIV.P. 56, summary judgment may be entered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Continental Ins. Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982) (citations omitted). The U. S. Court of Appeals for the Third Circuit has made clear that any doubts as to the existence of genuine issues of fact are to be resolved against the moving parties. Further, the facts and inferences to be drawn must be viewed in the light most favorable to the party opposing the motion. *Continental Ins. Co. v. Bodie*, 682 F.2d 436 (3d Cir. 1982).

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THE NATIONAL LABOR RELATIONS ACT

It is the contention of the Industry movants that the purchased-coal clause in the 1974, 1978 and 1981 Wage Agreements[21] violates § 8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(e) which provides in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any

21. Since the clause under consideration is identical in all three agreements, we need not distinguish them. *See* footnotes "13", "14" and "15", *supra*.

other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

The Industry members assert that the illegality of the purchased-coal clause stems from the fact that it is not "primary" in objective, *i.e.*, is not addressed to labor relations between individual employers and its employees. Thus, the Industry contends, the clause, on its face, is "secondary" and "union signatory" as it seeks to benefit all union members rather than the members of the individual "work units." (The "work unit", the Industry asserts, properly encompasses the individual employers' employees and does not extend to all union members.)[22]

Moreover, the Industry members contend that the clause is not redeemed because it does not serve any legitimate "primary" objective, *i.e.*, "work preservation" or "union standards."

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22. Additionally, we note that Pulltight (C.A. No. 83-0061) in its memorandum in support of its motion for partial summary judgment states that although it signed the Wage Agreement of 1978, it is not a member of any multi-employer bargaining group. It is Pulltight's argument that it is atypical of the employers involved in this litigation because its business does not involve the mining of coal. Instead, Pulltight claims that it operates a coal preparation facility. Pulltight asserts that because its employees mine no coal, the purchased-coal clause cannot "preserve work", nor can it serve as a "union standards" clause for the same reason. The Trustees counter this by claiming that there is a factual dispute as to whether Pulltight is only a processor. However, counsel conceded that it was possible that coal processors who have Union employees would be covered by this agreement. Because the work unit extends beyond any individual employer, the Trustees argue that even if such a company were found, that fact would not make the purchased-coal clause "secondary" in objective. However, in light of the holding of this Opinion, these arguments need not be addressed.

The Industry members also claim that a penalty is placed on the purchase of all coal from non-signatories, which they claim discriminates against this group and also penalizes the Industry member signatory.[23] Furthermore, the Industry claims that the 1950 and the 1974 Pension Plans (which have been incorporated into each of the Wage Agreements), state that contributions to the Funds may only be made by an "employer", who is defined therein as a signatory to the Wage Agreement.[24] Thus, according to the Industry, even if a non-signatory wished to make a contribution to the Funds, it would be precluded from doing so by the restrictions drafted by the Union into the pension plans.

The Trustees and the Union resist the instant motions primarily on the basis that there are disputes as to material issues of fact which they claim would preclude the granting of summary judgment. The Trustees and the union contend, *inter alia*, that the following are in dispute: (1) the purpose and effect of the purchased-coal clause; (2) the labor costs of signatories as opposed to non-signatories; 3) the relationship of labor costs of signatories and non-signatories *vis-a-vis* the 1974, 1978 and 1981 Wage Agreements; and (4) the relevant "work unit."

The Union and the Trustees also assert that the appropriate "work unit" is the bargaining unit, a nation-

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23. At oral argument, counsel for the Trustees, in presenting its contention regarding the cost differentials in purchasing coal from non-signatories compared to coal produced by Union members, claimed that the royalty does not impose a penalty on non-signatories. The basis of this argument is that the royalty serves to equalize the difference between union labor costs and nonunion labor costs. The Trustees claim the royalty serves as an equalizer and not as a penalty, and that it performs the work of a "union standards" clause.

24. *See* footnote "16", *supra.*

wide unit, or at least that which includes the Bituminous Coal Operators Association, and not that of the individual employers. Further, at oral argument counsel for the Union argued that the Union is unique because it has a nationwide contract. Therefore, the Union and the Trustees contend that all the employees covered by the one contract are the employees who comprise the "work unit" and it is their work that this clause seeks to protect. Thus, the Union and Trustees admit that the "work unit", for the purpose of the purchased-coal clause, goes beyond individual employer-employee units.[25]

Additionally, the Trustees and the Union assert: that the Union had a lawful objective in negotiating the purchased-coal clause; that the proper "work unit" is not always a single employer; and that the appropriate "work preservation" unit is the "contract-wide" unit. Further they submit that changes in federal law, *i.e.*, the enactment of ERISA (29 U.S.C. §§ 1001, *et seq.*), support the legality of a "contract-wide" "work unit."

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25. Additionally, at oral argument, the Trustees argued that even if a non-signatory were to provide the identical wages and benefits offered by the signatory, the costs of these benefits to the non-signatory would still be substantially less than the cost of these benefits to the signatories. It is alleged by the Trustees that the Union has been offering substantial pension benefits to more than 85,000 retired miners. The burden of paying for these substantial pensions falls upon an ever-decreasing number of employed unionized miners. Counsel for the Trustees admitted that *signatories are paying into the Pension Fund not only for their own employees, but also for a large number of pensioners who may never have worked for that signatory.* When asked by the Court if counsel were stating that the purpose of the clause was to benefit the Union Pension Fund rather than the Union employees of Duquesne, counsel responded that the clause was designed to protect the pensions that the Union negotiated for Duquesne's employees and, additionally for the employees of all of the companies who are involved in this litigation. (The Union later attempted to qualify this argument of the Trustees by stating that the purpose of the clause was not for the benefit of the pensioners.)

The Trustees and the Union also contend that the work standards of the Industry generally must be considered, since they allege that non-signatories generally have substandard wages, benefits and conditions.

In connection with the appropriate "work unit", the Industry argues that the purchased-coal clause reaches beyond the. "work unit" of any single employer and creates a "work unit" which is Industry-wide. As set forth above, the nationwide scope of the "work unit" is not disputed by the Trustees and the Union. The Industry further contends that no case has ever held that a "work unit" encapsulates the entire industry.

The Trustees and the Union further argue that determination of these motions cannot be made at this stage in light of *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967) and its requirement for an "inquiry into...all the surrounding circumstances." *Id.* at 644. Conversely, the Industry contends that this Court can and should determine summarily that the purchased-coal clause is "secondary" and "union signatory" and therefore violative of § 8(e) of the NLRA as the "work unit" cannot be deemed to be nationwide.

Thus, the immediate issues before this Court are whether the purchased-coal clause is "primary" or "secondary" in objective and whether such a determination requires a factual inquiry which would preclude summary judgment. With respect to the latter, we find that for purposes of the summary judgment motions before this Court, that the record is sufficient, as the facts relied upon by this Court are undisputed.

* * *

Pursuant to § 8(e) of the NLRA, any agreement by which an employer agrees to cease doing business with another employer or person is an unfair labor practice and, therefore, "unenforceable and void." Such agreements are also referred to as "hot-cargo" agreements due to their genesis in the trucking industry. Section 8(e), the "hot-cargo" provision, was enacted to correct a loophole created by *Carpenters' Union v. N.L.R.B.*, 357 U.S. 93 (1958) *("Sand Door")*, which held that such an agreement was not *per se* illegal. Thus, notwithstanding the wording of the statute, not all "hot-cargo" agreements are "unenforceable and void"; the "hot-cargo" provision only prohibits "secondary" aims. "Primary" objectives, *e.g.*, "work preservation", are not prohibited by the provision. *National Woodwork Association v. N.L.R.B.*, 386 U.S. 612 (1967). In distinguishing between the two, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *N.L.R.B. v. International Longshoremen's Association*, 447 U.S. 490, 504 (1980), quoting *National Woodwork Association v. N.L.R.B.*, *supra*, 386 U.S. at 645 and omitting footnote.

Therefore, in order for a clause to be construed as "primary" and not be prohibited by § 8(e) of the NLRA, it must benefit members of the relevant "work unit" and not the union membership as a whole. *Amax Coal Co. v. N.L.R.B.*, 614 F.2d 872 (3d Cir. 1980) *rev'd on other grounds*, 453 U.S. 322 (1981).

In *Riverton Coal Co. v. United Mine Workers of America*, 453 F.2d 1035 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972), the clause of the collective bargaining agreement requiring payment by employers of eighty cents into the union's welfare and retirement fund for each ton of coal for which the forty-cent royalty "had not

been paid into said Fund", *(i.e.*, when coal was purchased from a non-signatory operator),[26] was found to be "secondary" and therefore violative of § 8(e) of the NLRA.[27] In so holding, the U.S. Court of Appeals for the Sixth Circuit stated:

> The eighty cent penalty clause was not directed at job security, because Riverton could comply therewith by closing its mines, discharging all of its employees, and filling its entire requirements with coal from other signatory mines. Furthermore, Riverton could purchase coal from a signatory mine supplier whose employees were operating under substandard wages and working conditions.

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26. This clause is considered the predecessor to the purchased-coal clause. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

27. The Trustees and the Union argue that Riverton was wrongly decided and should be disregarded by this Court. The basis of their argument is that if the Riverton Court was correct in its analysis of the work preservation issue, a signatory could close its own mines and purchase all its coal from another signatory. Therefore there could be no "union standards" clause because any such clause would not allow a company to "shut down." Furthermore, the Trustees argue that the Riverton Court was incorrect when it stated that the company could purchase coal from a signatory whose wages and working conditions were substandard. According to the Trustees, all signatories have the same standards. Finally, the Trustees contend that the Riverton Court found as a matter of fact that Riverton (a single employer) was the appropriate work unit and that Riverton was only buying supplemental coal. The same findings cannot be made by this Court on the record at this stage, according to the Trustees and the Union. Instead, they urge this Court to follow International Union, U.M.W.A. (Dixie Mining Co.), 188 N.L.R.B. 753 (1971) which held the same eighty-cent clause to be permissible under § 8(e) of the NLRA as a "union standards" clause. In this connection, we note that in *Kaiser v. Mullins*, 455 U.S. 72 (1982), the Supreme Court failed to mention Dixie Mining and cited Riverton authoritatively.

> The trouble is that the clauses in question here were not, 'addressed to the labor relations of the contracting employer [Riverton] vis-a-vis his own employees', but on the contrary, to the boycotted employers (non-signatory suppliers).

Id. at 1040-1041, citing *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967).

A "union standards" clause has a "primary" objective and is legal, but a "union signatory" clause has a "secondary" objective and is therefore illegal under § 8(e) of the NLRA. Further, a "union standards" clause serves to restrict certain transactions with nonunion employers unless they "observe certain pay scales and conditions of employment." *N.L.R.B. v. National Maritime Union of America*, 486 F.2d 907, 912 (2d Cir. 1973), *cert. denied* 416 U.S. 970 (1974). *See also Truck Drivers Union Local No. 413 v. N.L.R.B.*, 334 F.2d 539 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 916 (1964). However, a clause will be deemed a "union signatory" clause when "the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units." *N.L.R.B. v. National Maritime Union of America, supra*, 486 F.2d at 913. Therefore, a clause which goes beyond the signatory employer and attempts to deal with a union's differences with a nonsignatory is "secondary" and therefore illegal under § 8(e) of the NLRA. *See, e.g., Local 644, United Brotherhood of Carpenters and Joiners of America v. N.L.R.B.*, 533 F.2d 1136 (D.C. Cir. 1976).

Thus, a multi-employer bargaining unit may not claim that a clause is "primary" and a "work preservation" clause because it preserves the work of the entire

multi-employer bargaining unit. If such clauses were considered "primary", the prohibition of the § 8(e) of the NLRA would then become the rule. *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. N.L.R.B.*, 654 F.2d 1301 (9th Cir. 1981), *aff'd in part, vacated in part sub nom., Woelke & Romero Framing, Inc. v. N.L.R.B*, 456 U.S. 645 (1982). *But see, Plumbers & Steamfitters Local 342 v. N.L.R.B.*, 598 F.2d 216, (D.C. Cir. 1979). Further, even if an objective of the union is to preserve work for the employees of individual operators, when another objective is to benefit the union members generally, the clause becomes "secondary." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. N.L.R.B., supra* 654 F.2d at 1308.

Therefore, a clause will be construed as "secondary" and will be prohibited by § 8(e) of the NLRA if it is to be found to be "union signatory", *i.e.*, if it seeks to benefit the union as a whole, rather than the individual employer's employees. *See e.g., Amax Coal Co. v. N.L.R.B.*, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981). In *Amax*, the U. S. Court of Appeals for the Third Circuit, in reviewing an order of the NLRB, upheld, *inter alia*, the Board's finding that the "construction clause" in the contract violated § 8(e). The clause, in regard to the "construction of mine or mine related facilities" permitted the employer to utilize "outside contractors" of its choice only when "UMWA contractors qualified to do the work are not available." *Id.* at 888. The *Amax* Court held that the clause was "union signatory" and therefore violated § 8(e) of the NLRA:

> This clause prohibits Amax from subcontracting to a non-UMWA subcontractor even if he maintains working conditions equivalent to Amax's. It only serves the Union's own interest in making sure the

> subcontractor recognizes the Union, and does not provide any benefit to Amax's employees.

Id. at 888.

* * *

After careful consideration of the numerous arguments raised by all parties, this Court finds the purchased-coal clause to be a "union signatory" clause, and as such, violative of § 8(e) of the NLRA. The impact of the purchased-coal clause reaches beyond any case-defined "work unit", *i.e.*, single employer, and seeks to benefit all Union members. The intended reach of the purchased-coal clause is not disputed. The Trustees and the Union readily admit its nationwide scope. Since the purchased coal clause is not, as mandated by *National Woodwork*, "addressed to the labor relations of the contracting employer *vis-a-vis* his own employees", it is illegal as it is "union signatory."

Additionally, this Court does not find any "primary" objectives, *i.e.*, "work preservation" or "union standards" in connection with the purchased-coal clause which would serve to make it permissible under § 8(e) of the NLRA. As set forth above, the appropriate "work unit" is the individual Industry member's employees, not all Union members. Moreover, the purchased-coal clause is not directed at "work preservation" because each Industry member "could comply therewith by closing its mines, discharging all of its employees, and filling its entire requirements with coal from other signatory mines." *Riverton Coal Co. v. U.M.W.A.*, 453 F.2d 1035, 1040-1041 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972).

Moreover, if this Court were to define the "work unit" at issue as a nationwide one, this would effectively make "secondary" objectives, *i.e.*, "union signatory" agreements, permissible under § 8(e) of the NLRA rather than prohibited. This would totally emasculate the statute. Further, assuming *arguendo* that this Court found the purchased-coal clause to be "work preservational" *vis-a-vis* employees of individual employers, clearly the Union's intent to benefit its members generally makes the clause "secondary." However, as noted above, the Court does not even find the clause "work preservational" as it is not directed at the appropriate "work unit."

Additionally, this Court does not find that the purchased-coal clause is a "union standards" clause. This clause imposes a penalty on all coal purchased from any non-signatory. It imposes this penalty indiscriminately in connection with the purchase of coal from any non-signatory without taking into account that the non-Union operator may have the same or better working conditions. "If [the purchased-coal clause] is illegal under the antitrust or the labor laws, it is because of the financial burden which the agreement attached to purchases of coal from non-UMW producers, even though they may have contributed to other employee welfare funds." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 79 (1982).

Accordingly, the Industry members' motions for summary judgment are granted. Since the purchased-coal clause is violative of § 8(e) of the NLRA, it is unenforceable and void. Therefore, its enforcement is permanently enjoined.

With respect to those Industry members which are Plaintiffs,[28] summary judgment is granted in their favor and any and all Counterclaims against them seeking enforcement of the purchased-coal clause and contributions to the Funds are dismissed. In connection with those Industry members which are Defendants,[29] judgment on their respective Counterclaims and/or Affirmative Defenses is granted, and the respective actions against them are dismissed.

We note that two of the Industry member Plaintiffs and one Industry member Defendant also seek damages on both the § 8(e) and the antitrust claim.[30] With respect to them, § 8(e)damages, if even appropriate, will not be considered at this juncture.

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28. *See* footnote "1", *supra.*

29. *See* footnote "2", *supra.*

30. *See* footnote "12", *supra.*

THE SHERMAN ACT

It is also the contention of certain Industry movants[31] that the purchased-coal clause contained in the 1974, 1978 and 1981 Wage Agreements violates § 1 of the Sherman Act, 15 U.S.C. § 1 which provides as follows:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Industry movants contend that summary judgment is appropriate in certain antitrust cases, particularly when a *per se* violation has occurred, which they claim has transpired here. In this regard, they state that the holding of *Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d 494 (3d Cir. 1979) *("Conex I"), vacated and remanded on other grounds*, 448 U.S. 902 (1980), *on remand*, 641 F.2d 90 (3d Cir.

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31. In conformity with this Court's holding with respect to § 8(e) of the NLRA, the antitrust portion of this Opinion applies only to those Industry movants who have asserted claims for antitrust damages. (Since this Court has already enjoined the enforcement of the purchased-coal clause, based upon its violation of 8(e) of the NLRA, it will not consider the Industry movants' application for an injunction based on claimed violations of the Sherman Act.) Therefore, for the purposes of the antitrust portion of this Opinion, the term "Industry" movants refers solely to Duquesne (C.A. No. 81-870) and Associated (C.A. Nos. 83-2060 and 83-2626).

1981) (*"Conex II"*), mandates a *per se* finding. The Industry movants further contend that, in any event, the Trustees and the Union are not entitled to a labor exemption, citing *Connell Construction Co., Inc. v. Plumbers Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Additionally, they assert that neither of the two required labor exemption tests set forth in *Conex I* are met here.

The Industry movants also claim that the purchased-coal clause, on its face, is an illegal group boycott, and as such, is *per se* violative of the antitrust laws. More particularly, they assert that the clause is an agreement among Union operators and the Union to deal with non-union operators only on unfavorable terms, citing *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Conex I, supra*, 602 F.2d 494. Further, in reply to the arguments of the Union and the Trustees, the Industry submits that a rule of reason analysis is unwarranted here, as they claim that *Conex I, supra*, 602 F.2d 494, mandates the conclusion that the purchased-coal clause is a *per se* violation. Therefore, the Industry movants contend that they are entitled to injunctive relief[32] and damages.

Conversely, the Union and the Trustees assert that if the purchased-coal clause is found to be violative of § 8(e) of the NLRA, this does not preclude the availability of the labor exemption to the antitrust laws. In this connection, the Union further asserts that the purchased-coal clause is exempt from the antitrust laws irrespective of its legality under § 8(e) of the NLRA. The

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32. As set forth *supra* at footnote "31", this Court will not address the claims for injunctive relief based upon alleged antitrust violations.

Union argues that it is entitled to both a statutory and a non-statutory exemption. The Union claims, with respect to the latter, that the purchased-coal clause encompasses a mandatory subject of collective bargaining, as it asserts that "the Funds are really another form of compensation to the employees." The Trustees, on the other hand, concede the unavailability of the statutory exemption. However, they do claim that the non-statutory exemption is available, basically for the same reasons asserted by the Union.

Additionally, both the Union and the Trustees claim that summary judgment is inappropriate because there has been no *per se* violation of the Sherman Act. Therefore, they claim, the appropriate analysis utilizing the rule of reason standard would preclude summary judgment due to the factually insufficient record. In any event, the rule of reason analysis, they contend, would prove the purchased-coal clause to be a reasonable restraint of trade. The Union further claims that the Industry has not demonstrated that it has sustained "injury in fact."

* * *

There are a number of statutory sources which exempt organized labor from the federal antitrust laws: §§ 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. These statutes declare that labor unions are not "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17.

Additionally, secondary picketing and boycotts are also exempt from the antitrust laws. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local No. 100,* 421 U.S. 616 (1975). However, these exemptions apply

only to unilateral activity on the part of a union. The statutory exemption does not shield a labor union from the antitrust laws when it engages in a conspiracy with a nonlabor organization. *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945). Moreover, all exemptions from the antitrust laws are to be narrowly construed by the courts. *Group Life & Health Insurance Co. v. Royal Drug Company*, 440 U.S. 205 (1979).

Since the Union's activity is not unilateral, this Court concludes that the Union is not entitled to a statutory exemption.

In addition to the statutory exemptions, labor unions, under the proper circumstances, are entitled to a judicially-created non-statutory exemption.

The U. S. Court of Appeals for the Third Circuit in *Conex I, supra*, 602 F.2d 494, in discussing the non-statutory exemptions, restated the two basic principles originally articulated by the Supreme Court in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940):

> First, the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act. Second, restraints, like those in *Duplex Printing Co.* and *Bedford Cut Stone*[33] which are aimed at controlling a secondary product or service market are suspect, and are presumptively covered by the Sherman Act.

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33. *Duplex Printing Co. v. Deering*, 254 U.S. 443 (1921) involved a secondary boycott. *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*, 274 U.S. 37 (1927), involved a refusal to handle the primary's product.

602 F.2d at 514.

Further, in its analysis of the non-statutory exemption, the Supreme Court established the boundaries of that exemption in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Connell, a general contractor, subcontracted plumbing and mechanical work on the basis of competitive bids Its employees, represented by building trade unions, were not represented by Local 100. However, Local 100 asked Connell to enter into an agreement whereby it would subcontract work only to those groups which had a contract with Local 100. Upon Connell's refusal to enter into such an agreement, Local 100 picketed one of Connell's construction sites. After some of its employees walked off the job, Connell filed suit, alleging, *inter alia*, that the agreement violated § 1 of the Sherman Act.

In reversing the decisions of the district court and of the Court of Appeals for the Fifth Circuit, the Supreme Court held that the union was not exempt from the antitrust laws. The *Connell* Court found that Local 100 implemented its goal of organizing subcontractors by imposing direct restraints on the market and held that the agreement between Connell and Local 100 resulted in the exclusion of non-signatories from the market, notwithstanding that their competitive advantage may have been the result of efficient operations rather than substandard wages and working conditions. In so doing, the Court stated: "[l]abor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members." *Id.* at 622. Additionally, the *Connell* Court stressed that the elimination of competition derived from efficient methods was not a goal of federal labor

policy and, rather, was precisely what the antitrust laws were designed to prevent.

Similarly, the *Conex I* Court also noted the limited application of a non-statutory exemption: "[t]hus §§ 8(b)(4) and 8(e) reinforce rather than conflict with the basic policy of the antitrust laws, and suggest a cautious approach to the recognition of a nonstatutory antitrust exemption for conduct in violation of their prohibitions." 602 F.2d at 513 (footnote omitted).

While noting its limited availability, the *Conex I* Court established a separate test in connection with the exemption when money damages are sought. Specifically, when money damages are sought, in order to be successful in claiming this exemption, the Trustees and the Union must demonstrate that "at the time they acted...they could not reasonably have foreseen the subject matter of the agreement being challenged would be held to be unlawful under . . . § 8(e)."[34] 602 F.2d at 521.

In this connection, the Industry claims that under the initial part of the *Conex I* test, it was reasonably foreseeable that the purchased-coal clause would be held to be violative of § 8(e). Their argument is based in part on *Riverton Coal Co. v. United Mine Workers of America*, 453 F.2d 1035 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972), which was decided in 1972, two years before the 1974 Wage Agreement became effective. Similarly, the Trustees and the Union have consistently maintained that the purchased-coal clause is a direct descendant of the eighty-cent clause, but instead rely on *International Union, U.M.W.A. (Dixie Mining Co.)*, 188 N.L.R.B. 753 (1971), which upheld the eighty-cent clause.

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34. However, a successful showing that it could not have been foreseen that the agreement would violate § 8(e) does not automatically entitle the party to the exemption. "[The Union] must also

For the reasons set forth in the preceding portion of the Opinion, this Court declines to follow the *Dixie Mining* case. Furthermore, we note that in all three agreements, a contingency clause was included in Article XX. Each clause provides that if the purchased-coal clause is determined either "invalid" or "in violation of the National Labor Relations Act", the Union shall have the option to renegotiate for a replacement clause, if such determination is not appealable.[35] Concerning this very point, the Court of Appeals for the D. C. Circuit noted that the question of illegality of the purchased-coal clause had been foreseen by the parties: "[t]he terms of the 1974 Agreement clearly indicate that the parties were concerned about the legality of the purchase-of-coal clause and about having their bargained-for agreement undone by subsequent legal rulings on that point." *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1306 (D.C. Cir. 1980), *reversed and remanded*, 455 U.S. 72 (1982).

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demonstrate that the contract provisions and steps taken to implement them were 'intimately related' to the object of collective bargaining thought at the time to be legitimate, and went no further in imposing restraint in the secondary market than was reasonably necessary to accomplish it." 602 F.2d at 521.

35. The 1974, 1978 and 1981 Wage Agreements each contain a "savings clause" which provides in pertinent part as follows:

> The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by final decision that is not appealable that the provision appearing in paragraph (v) just preceding is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option of and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

In light of the *Riverton* decision rendering the eighty-cent clause violative of § 8(e) of the NLRA and the existence of a "savings clause" in each of the Wage Agreements, any assertions by the Union and the Trustees that it was not reasonably foreseeable that the purchased-coal clause would subsequently be declared illegal, are, at best, disingenuous. Therefore, this Court finds that the Union and the Trustees have not met the foreseeability requirement of the *Conex I* test concerning claims for damages under the antitrust law. It is therefore unnecessary to address the second part of the test. Accordingly, this Court concludes that the Union is not entitled to the non-statutory exemption.

Once a court has made the determination that the non-statutory labor exemption is inapplicable to a given factual situation, it must then apply traditional antitrust law. *Conex I, supra*, 602 F.2d at 522. *See also, Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 670 F.2d 421 (3d Cir. 1982), *cert. denied*, 456 U.S. 1005 (1982) ("*Muko II*"). As a general rule, a court will apply the rule of reason standard, but the *per se* rule applies in appropriate cases and obviates the need for an extensive analysis. *Muko II, supra*, 670 F.2d at 428. This Court must therefore determine at the outset whether the purchased-coal clause constitutes a *per se* violation of the antitrust laws.

In this connection, the Industry members claim that the purchased-coal clause is illegal *per se* under the antitrust laws as it constituted an unlawful group boycott which they claim was an agreement among Union operators and the Union to transact business with another group, *i.e.*, nonunion operators, only on unfavorable terms. Additionally, the Industry asserts that the agreement, in order to be classified as a group boycott, need

not encompass a total prohibition against transactions with the boycotted parties, but only an agreement to deal unequally or unfavorably with them, citing *Montague & Co. v. Lowry*, 193 U.S. 38 (1904) and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Further, the Industry members contend that *Conex I* mandates a *per se* finding as they claim the court held that if the particular provision of the collective bargaining agreement is illegal under the labor laws, it is a *per se* violation of the antitrust laws. Conversely, the Trustees and the Union urge that the finding of a violation of § 8(e) of the NLRA does not necessarily lead to the finding of a *per se* violation of the antitrust laws, citing *Muko II*, *supra*, 670 F.2d 421.

Contrary to the contentions of the Industry members, this Court finds that *Conex I*, *supra*, 602 F.2d 494, does not mandate the finding of a *per se* antitrust violation after a § 8(e) violation of the labor laws has been found.

However, the *Conex I* Court set forth the situations in which group boycotts traditionally have been held to be *per se* violations of the Sherman Act:

> (1) horizontal combinations of traders at one level of distribution having the purpose of excluding direct competitors from the market . . . (2) vertical combinations, designed to exclude from the market direct competitors of some members of the combination . . . (3) coercive combinations aimed at influencing the trade practices of boycott victims. . . .

Id. at 522 (citations omitted).

The *Conex I* Court then concluded that the conduct at issue had "horizontal, vertical and coercive aspects" and constituted an agreement *to exclude totally all competition*. *Id.* at 522. Because of the obvious and clear

anticompetitive aspects of the *Conex I* facts, the Court found a per se violation and eliminated the need for an "elaborate study." *Id.* at 523.

In *Muko II, supra*, 670 F.2d 421, the U. S. Court of Appeals for the Third Circuit provided some additional guidance for the district court in determining what union conduct should be classified a *per se* violation of the Sherman Act. In *Muko II, supra*, 670 F.2d 421, although the plaintiff claimed that the union's agreement with a third party to utilize only union labor was a group boycott, and as such, was *per se* violative of the antitrust laws, this assertion was rejected by the Court. However, it noted that the involvement of a labor union "in an otherwise illegal combination should not preclude a determination that, in appropriate circumstances, the conduct is unreasonable *per se*", and stated that its application in the labor context must not be "mechanical or imprudent." *Id.* at 426 (citation omitted). The Court also rejected the contention of the plaintiff that the *per se* standard applies whenever the union fails to obtain the labor exemption or whenever an 8(e) violation is found.

Similarly, this Court rejects the Industry's contentions; we do not find that a *per se* violation has occurred based on either of these grounds. Instead, this Court must examine the conduct and decide if a *per se* finding is warranted.

Although the *Muko II* Court upheld the application of the rule of reason by the district court, it articulated the traditional antitrust principles a court uses to determine whether the questioned conduct is violative of the antitrust laws and what analysis should be applied:

> In most cases, a "rule of reason analysis" requires a detailed examination of the affected business and the nature of the restraint imposed. There are, however,

> "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"... Such determinations of *per se* illegality are not casually made ... " it is only after considerable experience with certain business relationships that courts classify them as *per se*, violations of the Sherman Act' ... Neither mere speculation, nor the desire to simplify the cumbersome process of determining antitrust illegality, is enough to justify the imposition of a *per se* rule.

Id. at 428 (footnotes and citations omitted).

Moreover, although group boycotts initially appeared to be labeled by courts as *per se* violations, "the application of the *per se* rule has been limited to those 'classic' boycotts in which a group of business competitors seek to benefit economically by excluding other competitors from the marketplace." *Id.* at 429 (footnote omitted). *See also, DeFilippo v. Ford Motor Co.*, 516 F.2d 1313 (3d Cir. 1975), *cert. denied*, 423 U.S. 912 (1975).

In this regard, the *Muko II* Court held that the agreement by the labor union and a fast food chain not to use nonunion contractors was not a *per se* violation of the antitrust laws as it was not a "classic" group boycott. Given the guidelines of *Muko II*, *supra*, 670 F.2d 421, this Court similarly does not find that the purchased-coal clause, which attached a financial penalty to coal purchased from nonunion producers, to be a "classic" group boycott or therefore a *per se* violation, as it is not:

> an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying

> to compete. The classic boycott . . . also usually entails an effort to induce two or more suppliers or customers not to deal with firms being excluded from the protected level.

Muko II, supra, 670 F.2d at 429-430, citing L. Sullivan, *Handbook of the Law of Antitrust* 260 (1977).

Since we do not find that the Union committed a *per se* violation of the antitrust laws, it is necessary to apply a rule of reason analysis to the instant factual situation.

We turn next to the issue of whether an antitrust determination can be made from the facts currently before this Court.

In *Muko II, supra*, 670 F.2d 421, the rule of reason determination was made by a jury after a full trial. Although the *Muko II* Court is silent on whether a rule of reason analysis could be made without a trial, it has noted that such an inquiry mandates a detailed examination of both the "affected business" and the "nature of the restraint imposed." *Id.* at 428.

In similar connection, Mr. Justice Brandeis, in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), articulated his now classic statement concerning the rule of reason:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason

> for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret fact and to predict consequences.

Id. at 238.

Obviously, the record before this Court is not complete in this respect. Although the Industry movants have submitted various affidavits, these do not satisfactorily address the rule of reason considerations set forth initially by Mr. Justice Brandeis. Accordingly, this Court concludes that the Industry movants have not met their burden with respect to their antitrust claim and summary judgment on this claim is denied.

An appropriate Order will issue.

ORDER

And now, this 21st day of February, 1984, in conformity with the foregoing Opinion, it is hereby ORDERED that the summary judgment motions of the Industry members based upon the illegality of the purchased-coal clause in the 1974, 1978 and 1981 Wage Agreements under 29 U.S.C. § 158(e) are GRANTED.

Since this Court finds the purchased-coal clause of 1974, 1978 and 1981 Wage Agreements violative of 29 U.S.C. § 158(e), the clause is unenforceable and void and therefore its enforcement is permanently enjoined.

Additionally with respect to the Industry movants under 29 U.S.C. § 158(e) which are Plaintiffs, any and all counterclaims made against them seeking enforcement of the purchased-coal clause and contributions to the Funds are DISMISSED. In connection with those Industry member Defendants seeking only injunctive relief under 29 U.S.C. § 158(e), judgment on their respective 29 U.S.C. § 158(e) counterclaims and/or Affirmative Defenses is GRANTED and the respective actions against them are DISMISSED.

With respect to the Trustees in C.A. No. 83-0069, their motion for summary judgment which seeks contributions to the Funds is DENIED.

Further, it is hereby ORDERED that the motions of various Industry members seeking summary judgment based upon the illegality of the purchased-coal clause in the 1974, 1978 and 1981 Wage Agreements under 15 U.S.C. § 1 are DENIED.

However, with respect to those Industry movants seeking antitrust damages and damages under 29 U.S.C.

§ 158(e),[1] liability under the Sherman Act as well as damages under the Sherman Act and the National Labor Relations Act will be explored at trial. With respect to these three actions only, the parties are to submit to the Court a statement of outstanding discovery and a proposed discovery deadline. The above must be filed by March 8, 1984. All other actions are DISMISSED.

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1. Duquesne (C.A. No. 81-870) and Associated (C.A. Nos. 83-2060 and 83-2626).

APPENDIX C

ORDERS WITH RESPECT TO PETITIONS FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3166/67, 84-3220, 84-3237, 84-3371

IN RE: BITUMINOUS COAL WAGE AGREEMENTS LITIGATION

Trustees of the United Mine Workers of America Health and Retirement Funds,
Appellants in Nos. 84-3166 & 84-3220

International Union, United Mine Workers of America,
Appellant in Nos. 84-3167 & 84-3237

Duquesne Light Company and Associated Electric Cooperative, Inc.,
Appellants in Nos. 84-3371 & 84-8067

(D.C. Civil Misc. No. 9604-536)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and BECKER, *Circuit Judges*, and THOMPSON, *District Judge.**

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*The Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

The petition for rehearing filed by appellees, Associated Electric Cooperatives, Inc., Duquesne Light Company, Union Carbide Corporation and United States Fuel Company in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams, Gibbons and Sloviter did not participate in the decision of this matter.

BY THE COURT

/s/ WEIS, J.
Circuit Judge

DATED: April 1, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3166/67, 84-3220, 84-3237, 84-3371

IN RE: BITUMINOUS COAL WAGE AGREEMENTS LITIGATION

Trustees of the United Mine Workers of America Health and Retirement Funds,
Appellants in Nos. 84-3166 & 84-3220

International Union, United Mine Workers of America,
Appellant in Nos. 84-3167 & 84-3237

Duquesne Light Company and Associated Electric Cooperative, Inc.,
Appellants in Nos. 84-3371 & 84-8067

(D.C. Civil Misc. No. 9604-536)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and BECKER, *Circuit Judges*, and THOMPSON, *District Judge.**

---

*The Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

The petition for rehearing filed by Old Home Manor, Inc. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams, Gibbons and Sloviter did not participate in the decision of this matter.

BY THE COURT

/s/ WEIS, J.
Circuit Judge

DATED: April 1, 1985

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(D.C. Civil Misc. No. 9604-536)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and BECKER, *Circuit Judges*, and THOMPSON, *District Judge.**

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*The Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

The petition for rehearing filed by appellees Pulltight Coal, Inc., Lakeside Coal Company and Kinlock Coal, Inc. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams, Gibbons and Sloviter did not participate in the decision of this matter.

BY THE COURT

/s/ WEIS, J.

Circuit Judge

DATED: April 1, 1985

APPENDIX D

PARTIES TO PROCEEDING IN COURT OF APPEALS

In addition to the parties named in the caption of the case in this court, the following were appellees in the Court of Appeals:

Associated Electric Cooperative, Inc.
Consolidation Coal Company
Doe Valley Coal Company
Douglas Pocahontas Coal Company
Gilbert Fuel Company
Harmar Coal Company
Kinlock Coal, Inc.
Lakeside Coal Company
La Luz Ohio, Inc,
Luzerne Coal Corporation
Metco Mining Corporation
Muskingum Mining Company
Old Home Manor, Inc.
Pulltight Coal, Inc.
Royalty Smokeless Coal Company
Reitz Coal Company
Shannon Pocohontas Coal Company
Union Carbide Corporation
United States Fuel Company
Virginia Crews Coal Company
West Newton Coal Logistics Company

In addition to the parties named in the caption of the case in this Court, the following were appellants and cross-appellees in the Court of Appeals:

John J. O'Connell, Harrison Combs, and Paul R. Dean, in their capacities as Trustees of The

United Mine Workers of America 1950 Pension Trust, 1950 Benefit Plan and Trust, 1974 Pension Trust and 1974 Benefit Plan and Trust.

The United Mine Workers of America 1950 Pension Trust

The United Mine Workers of America 1950 Benefit Plan and Trust

The United Mine Workers of America 1974 Pension Trust

The United Mine Workers of America 1974 Benefit Plan and Trust

The United Mine Workers of America Health and Retirement Funds.

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONERS PURSUANT TO SUPREME COURT RULE 28.1

Petitioners, Old Home Manor, Inc., Duquesne Light Company, Associated Electric Cooperative, Inc., Union Carbide Corporation, Luzerne Coal Corporation, Pulltight Coal, Inc. and West Newton Coal Logistics Company, have no publicly held parents, subsidiaries or affiliates.

Petitioner United States Fuel Company is wholly-owned by Sharon Steel Corporation, 86% of which is in turn owned by NVF Company.

Consolidation Coal Company is a subsidiary of E. I. du Pont de Nemours and Company.

Royalty Smokeless Coal Co., Virginia Crews Coal Co. and Shannon Pocahontas Mining Co. are each indirectly owned by Fluor Corporation and Royal Dutch Shell, both of which are publicly held corporations.

With respect to Petitioners Gilbert Fuel Company and La Luz Ohio, Inc., individually, and t/d/b/a Muskingum Mining Company, a partnership, the partnership known as Muskingum Mining Company is no longer in existence. The former Gilbert Fuel Company is now known as Crown City Mining, Inc. and the former La Luz Ohio, Inc. is now known as Muskingum Mining, Inc. La Luz Mines, Ltd. owns 100 percent of the stock of Muskingum Mining, Inc. (formerly La Luz Ohio, Inc.), and Muskingum Mining, Inc. owns 100 percent of the stock of Crown City Mining, Inc. (formerly Gilbert Fuel Co.).

Petitioner Harmar Coal Company is owned by Wheeling-Pittsburg Steel Corporation and Consolidation Coal Company.

Petitioner Kinlock Coals, Inc. is a wholly owned subsidiary of Alabama Land and Mineral Corporation, which in turn is 50 per cent owned by Pyro Energy Corporation (a public company), and Costain Coal, Inc. Costain Coal, Inc., is a wholly owned subsidiary of Costain Holdings, Inc., which is a wholly owned subsidiary of Costain Holdings, PLC (an English corporation).

Petitioner Lakeside Coal Company is wholly owned by Alabama Electric Cooperative, Inc.

Petitioner Reitz Coal Company is jointly owned by Berwind Corporation and A. T. Massey Company. A. T. Massey Company is in turn jointly owned by Fluor Corporation and Scallop Corporation, an American affiliate of Royal Dutch Shell Corporation.

Supreme Court, U.S.
FILED
AUG 12 1985
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CLERK

No. 84-2013

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DUQUESNE LIGHT COMPANY, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

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QUESTIONS PRESENTED

Respondent, the International Union, United Mine Workers of America, does not agree with petitioners' statement of the questions presented. The only questions properly presented by the Third Circuit's order vacating the summary judgments granted to petitioners, and remanding these actions for further pre-trial proceedings, are as follows:

1. Where the necessary facts were either contested, or not in evidence, did the court of appeals properly vacate summary judgments invalidating a provision of a collective bargaining agreement under § 8(e) of the NLRA, 29 U.S.C. § 158(e)?

2. Did the court of appeals properly require an inquiry into the purpose and function of a collectively bargained provision challenged under § 8(e) of the NLRA, 29 U.S.C. § 158(e), where the trial court had failed to consider or establish any facts regarding the purpose for which the Clause was negotiated, and the manner in which it functions?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-2013

DUQUESNE LIGHT COMPANY, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

The respondent, International Union, United Mine Workers of America ("the Union" or "the UMWA"), submits that the petition for a writ of certiorari to review the intermediate order entered by the United States Court of Appeals for the Third Circuit in these cases on February 27, 1985, should be denied. The Union concurs with petitioners' discussion of the *Opinions Below*, *Jurisdiction*, and the *Statute Involved*.

I. COUNTERSTATEMENT OF THE CASE

A. The Pre-Trial Status Of This Litigation

The 1974, 1978, and 1981 National Bituminous Coal Wage Agreements (collectively referred to as "the NBCWA") establish pension and benefit plans for coal miners and their families. Each signatory employer is obligated by the produced coal clause of the NBCWA, Article XX(d)(1), to make contributions to the plans based on its production measured by employee hours worked and tons of coal mined. In addition, Article XX (d)(1)(v) of the NBCWA, the purchased coal clause, requires an equivalent contribution on tons of coal purchased by each signatory as to which no produced coal contribution has previously been made. App. 4a.[1] Petitioners are signatory to the NBCWA and assert that the purchased coal clause is, on its face, a "union signatory" provision violative of 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e).[2]

Most of these cases began as actions to recover contributions due under the purchased coal clause. In those cases, the delinquent signatories interposed the affirmative defense of the Clause's illegality under § 8(e), and the UMWA intervened to defend its collective bargaining agreements. Several signatory employers initiated actions or brought counterclaims against the UMWA and the respondent plan trustees ("the Trustees") to obtain, variously, declarations of the Clause's illegality under § 8(e), injunctive relief, and damages. After the cases were consolidated, nineteen of the twenty-four delinquent coal companies involved in this litigation imme-

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[1] References to the Petition, its Appendix, and Joint Appendix filed by the parties in the court of appeals are as follows: "Pet. ——"; "App. ——"; and "J.A. ——".

[2] The petitioners will also be referred to as "operators" or "coal companies"; Article XX(d)(1)(v) of the NBCWA will be referred to as "the purchased coal clause" or "the Clause".

diately moved for summary judgment on their common contention that the Clause is a prohibited "union signatory" clause. Pending a decision on their summary judgment motions, the coal companies obtained an order staying discovery. App. 4a-5a; J.A. 575.

Petitioners' challenge to the purchased coal clause comes to this Court bereft of any factual development. The delinquent signatories supported their summary judgment motions solely with their reading of the Clause, arguing that its wording plainly exhibits the essential characteristic of a "union signatory" provision—it applies only to purchases from companies who have no agreement with the UMWA.[3] The operators expressly disclaimed reliance upon any other facts. J.A. 455-56, 575.

The Union and the Trustees vigorously disputed the factual and legal premises underlying the operators' portrayal of the Clause as a "union signatory" device. They emphasized that a wide gap exists between the high

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[3] The purchased coal clause provides:

> ". . . during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made . . . ."

App. 4a; J.A. 862.

The court of appeals correctly described the Clause as entirely neutral on its face:

> "When read in conjunction with the 'produced coal clause,' the effect [of the purchased coal clause] is to require an employer-signatory to pay an identical contribution to . . . [the plans] whether the coal was extracted from the employer's mines or was bought from an operator that had not already paid the assessed tonnage." App. 4a.

labor costs imposed by the NBCWA and the much lower labor costs of all other operators—a group which includes non-union operators, operators signatory to contracts with unions other than the UMWA, and operators signatory to UMWA contracts other than the NBCWA. App. 5a; J.A. 933, 937-40, 960-74, 990-91, 993-95, 996-1001, 1006-12, 1345-1428; *Industry Wage Survey: Bituminous Coal, July 1982*, U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin 2185 (1983). Inevitably, this large labor cost differential creates a compelling economic incentive for NBCWA signatory operators to subcontract the production of coal to non-signatory operators—through coal purchases—instead of mining coal with their own employees. To eliminate this financial temptation to subcontract collective bargaining unit work, the purchased coal clause imposes a surcharge which counterbalances the sizable differential between NBCWA signatories' labor costs and the much lower labor costs enjoyed by other operators. App. 5a. The Clause thus possesses the fundamental attribute of a "union standards" provision because it preserves the work of each individual NBCWA signatory's miners by removing the economic incentive to subcontract the production of coal to operators who do not incur labor costs equal to those imposed by the NBCWA.

The district court ignored this evidence, entered summary judgment invalidating the Clause and permanently enjoined its enforcement. App. 50a-51a. Reviewing the district court's decision under commonly accepted and basic labor law and summary judgment principles, a unanimous panel of the Court of Appeals for the Third Circuit decided that ". . . the prohibited secondary objective is not revealed by the language of the collective bargaining agreement here, and further inquiry is necessary."[4] App. 12a. A court that has never hesitated

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[4] The opinion was authored by Circuit Judge Weis. Circuit Judge Hunter and District Judge Thompson joined in Judge Weis' opinion.

to enforce the mandates of § 8(e), the Third Circuit remanded this case for further proceedings to establish the facts about the purpose for which the Clause was negotiated and the manner in which it is applied. App. 17a; *see, e.g., A. Duie Pyle, Inc.* v. *NLRB*, 383 F.2d 772 (3d Cir. 1967), *cert. denied sub nom. Teamsters* v. *A. Duie Pyle, Inc.*, 390 U.S. 905 (1968); *Amax* v. *NLRB*, 614 F.2d 872 (3d Cir.), *rev'd on other grounds*, 453 U.S. 322 (1980). Petitions for rehearing were denied, App. 52a-57a, and this Petition followed.

B. The Coal Industry Supports The Legality Of The Clause

The delinquent coal companies imply that they speak for all UMWA organized coal operators. *E.g.*, Pet. 5. Yet the principal collective bargaining agent for the coal industry, the Bituminous Coal Operators Association ("BCOA"), filed below a brief *amicus curiae* in support of the legality of the purchased coal clause. Although the BCOA resisted the Clause at the bargaining table because it restricts management's discretion to purchase and entails additional costs, it vigorously defends the Clause as a lawful work preservation measure.

The Petition refers to industrial unrest related to these proceedings. Pet. 15. The BCOA and the Union are not aware of any such unrest.[5] In 1984, the Union and the BCOA concluded a successor agreement to the 1981 NBCWA without any interruption of production and have depended entirely on the orderly administration of justice for resolution of the Clause's legality.

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[5] A stay of the Third Circuit's mandate has preserved the district court's injunction against collection of the purchased coal contribution. The ban on collecting the contribution will not result in reductions of pensioners' benefits. No unrest because of benefit reductions resulting from this litigation is, thus, conceivable.

II. REASONS FOR DENYING THE WRIT

A. The Opinion Below Faithfully Follows This Court's Past And Recent Decisions Construing Section 8(e), And Presents No Important Issue Of Statutory Interpretation

Petitioners stake their entire case here, as they did below, on the contention that the purchased coal clause is, *per se*, a "union signatory" clause, because its applicability turns solely *"on the basis of union status."* Pet. 12 (Emph. supp.). Below, the UMWA and the Trustees demonstrated that the Clause, on its face and as applied to the realities of the bituminous coal industry, functions as a "union standards" provision to preserve collective bargaining unit jobs at each NBCWA operation.

They showed, first, that the Clause applies to all purchases of coal by NBCWA operators from those producers who, without regard to their "union status", are able to sell their coal more cheaply because they do not bear the uniquely high labor costs of the NBCWA. Such operators include two classes of UMWA signatories: (1) NBCWA operators who evade their contractual obligations to contribute to the plans, and (2) operators signatory to collective bargaining agreements with the UMWA which do not require contributions in amounts equal to those imposed by the NBCWA. Hence, the Clause does not exempt purchases from UMWA producers, nor apply, in the fashion of a "union signatory" clause, solely to purchases from operators who have no UMWA agreement.

Second, the UMWA and the Trustees established that the wide differential between the price of labor under the NBCWA and the labor costs of other mine operators induces NBCWA signatories to trim back their production and satisfy their customers' demands with substandard coal. This form of subcontracting diminishes opportunities for work at each NBCWA operation. J.A. 736-

38. By imposing a charge equivalent to the major component of NBCWA labor costs—its fringe benefit costs—on purchases of substandard coal by NBCWA signatories, the Clause, like all "union standards" provisions, removes labor cost considerations from subcontracting decisions.

Petitioners' principal argument for invoking this Court's review, on this record, is that the court of appeals approved a "radically different approach" to § 8(e) when it rejected their depiction of the Clause as a *per se* "union signatory" provision. Pet. 13. In rejecting petitioners' *per se* "union signatory" argument, however, the Third Circuit relied squarely on the "totality-of-the-circumstances" test, *NLRB* v. *Pipefitters Local 638*, 429 U.S. 507, 524 (1977), for determining whether an agreement was negotiated for the purpose of preserving collective bargaining unit work, or for secondary objectives. This test, first enunciated in *National Woodwork Manufacturers Assoc.* v. *NLRB*, 386 U.S. 612, 644 (1967), was most recently affirmed in *NLRB* v. *International Longshoremen's Assoc.* (*"ILA II"*), 53 U.S.L.W. 4919, 4923 (U.S. June 27, 1985) (No. 84-861), and mandates an inquiry into "all the surrounding circumstances" of an agreement to ascertain whether its purpose is primary or secondary.[6]

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[6] The "totality-of-the-circumstances" test applied in this case is so firmly embedded in the appellate precedents that petitioners do not even assert any circuit conflict. *See, e.g., Carrier Air Conditioning* v. *NLRB*, 547 F.2d 1178, 1181 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *A. Duie Pyle, Inc.* v. *NLRB*, 383 F.2d 772, 775 (3d Cir. 1967), *cert. denied sub nom. Teamsters* v. *A. Duie Pyle, Inc.*, 390 U.S. 905 (1968); *Electro-Coal Transfer Corp.* v. *General Longshore Workers*, 591 F.2d 284, 290-91 (5th Cir. 1979); *American Boiler Manufacturers Assoc.* v. *NLRB*, 404 F.2d 556, 561 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *Frito-Lay, Inc.* v. *Retail Clerks Union Local No. 7*, 629 F.2d 653, 659-60 (10th Cir. 1980).

The National Labor Relations Board also conducts an inquiry into the purpose and function of a provision challenged under § 8(e),

Consistent with these rules, the Third Circuit performed the following black letter analysis:

> 1. A clause is prohibited under § 8(e) if its "*purpose*" is secondary; where a secondary purpose is "*apparent*" from the clause's "*necessary effect*," "a clause may be held invalid *per se*." App. 11a (Emph. supp.).
>
> 2. "But it is often difficult . . . to determine from the wording of the clause the union's 'tactical object,' [*National*] *Woodwork Manufacturers Assoc.*, 386 U.S. at 645, or 'design,' *Amax Coal*, 614 F.2d at 886. *More than the document itself is generally needed for that analysis.*" App. 11a (Emph. supp.). ". . . [E]ven if invalidity is not apparent because on its face the clause seems to comply with § 8(e), an 'as applied' violation may surface after more detailed factual development" App. 12a (Citation omitted). ". . . [*T*]*he prohibited secondary object is not revealed by the language of the collective bargaining agreement here, and further inquiry is necessary.*" App. 12a (Emph. supp.).
>
> 3. The court then provides evidentiary guidelines for determining whether ". . . economic factors may combine to exert pressure . . . on a non-union producer to recognize the union" or whether "[t]here *may* be other *factual* settings in which none of the justifications for work preservation . . . exist . . . ." App. 12a-14a (Emph. supp.).

The Third Circuit's focus, from the outset, on the purpose animating the Clause is faithful to this Court's decisions. The opinion simply cannot be read, as petitioners contend, to defy the holding in *NLRB* v. *Denver Building Trades Council*, 341 U.S. 675 (1957); the court of appeals did not announce a rule that "*other lawful objects*" will save a clause that has an illegal object.

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even where "[a] more blatant union signatory clause would be difficult to imagine." *E.g., District 2, Marine Engineers Beneficial Assoc.*, 261 NLRB 345, 348-51 (1982).

Pet 8-9 (Emph. supp.). Judge Weis expressly affirmed that a provision must have ". . . *no* forbidden secondary purpose to affect the employment relations of an outside employer . . . ." App. 9a (Emph. supp.).

A union's "tactical object" or "purpose" in negotiating a clause has always been the "touchstone" determining whether it is secondary or primary. *National Woodwork*, 386 U.S. at 644-45; *NLRB* v. *International Longshoremen's Assoc.*, (*"ILA I"*), 447 U.S. 490, 504, 507 n.22, 523 (1980); *ILA II*, 53 U.S.L.W. at 4923-24. A recent District of Columbia Court of Appeals decision, joined in by both Judges Bork and Mikva, puts it succinctly:

> "The term 'object' as it is found in the statute, or the words 'tactically calculated . . . objectives' as the Supreme Court paraphrased it in *National Woodwork*, are generally taken as synonyms for *'purpose.'* On that basis, it has been held . . . that the union's 'improper motive and intent' must be established . . . ." *United Scenic Artists, Local 1829* v. *NLRB*, 762 F.2d 1027, 1032-33 (1985) (Emph. supp.).

Because the Third Circuit could not discern any prohibited purpose on the face of the Clause, it concluded that "more than the document itself is . . . needed for analysis." App. 11a. Since the facts surrounding the Clause had not been "judicially established", or even considered by the trial court, the appeals court could not make that analysis in the first instance.[7] App. 14a.

By remanding these cases for an inquiry into whether the Clause operates to preserve the work of the collective bargaining unit or to pressure neutrals to recognize the Union, Judge Weis adhered to the well settled distinction between primary "union standards" and secondary "union signatory" clauses:

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[7] Petitioners may not, of course, rely on adverse inferences on summary judgment. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 157-58 (1970); *U. S.* v. *Diebold*, 369 U.S. 654, 655 (1962).

> "*A union standards clause is designed to inhibit subcontracting of work that would otherwise be performed by members of the bargaining unit.* This court described such an agreement in *A. Duie Pyle* as 'the exaction of requirements designed to protect union standards against substandard competition which might be an incentive for an employer to deprive his unionized employees of work.' A provision of that nature serves 'a primary rather than a secondary objective . . . .'
>
> "Falling on the other side of the line and violative of § 8(e) are *'union signatory clauses.'* In *A. Duie Pyle*, we held that *a collective bargaining agreement may not prohibit an employer from contracting with enterprises or individuals that are not unionized.*
>
> > " 'As in the case of secondary boycotts generally, *a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize.*' "
>
> App. 9a-10a (Emph. supp.) (Citation omitted).

See also NLRB v. *National Maritime Union of America*, 486 F.2d 907, 912-13 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); *Berman Enterprises, Inc.* v. *Local 333*, 644 F.2d 930, 937 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981); *Amax* v. *NLRB*, 614 F.2d at 887, *rev'd on other grounds*, 453 U.S. 322 (1980); *George Ryan Co., Inc.* v. *NLRB*, 609 F.2d 1249, 1254 (7th Cir. 1979); *NLRB* v. *Hotel & Restaurant Employees Union Local 531*, 623 F.2d 61, 67 (9th Cir. 1980); *A. Duie Pyle, Inc.* v. *NLRB*, 383 F.2d at 776-78; *Meat and Highway Drivers* v. *NLRB*, 335 F.2d 709, 716 (D.C. Cir. 1964); *Orange Belt District Council of Painters, No. 48* v. *NLRB*, 328 F.2d 524, 538-40 (D.C. Cir. 1964); *Truck Drivers Union Local No. 413* v. *NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

The facts proffered by the Union and the Trustees affirm that the purchased coal clause behaves as a "union standards" provision by counteracting the incentive to subcontract generated by the labor cost advantage enjoyed by operators not bound by the NBCWA. By appealing for "[a] bright line rule that fixed penalty clauses are illegal," petitioners concede that they cannot fit the Clause into a *per se* "union signatory" mold. Pet. 13. Such a "bright line", fashioned merely to absolve petitioners from their proof burdens, is not warranted. The Third Circuit correctly applied the bright line already drawn by the uniform precedents—that demarcating "union signatory" from "union standards" clauses.

That the Clause inhibits the subcontracting transactions of signatories does not transform it into a "union signatory" measure. Pet. 12. If the surrounding circumstances reveal, as this record does, that the Clause is designed and functions to diminish the threat to job security posed by the incentive to subcontract based on labor cost considerations, the Clause is primary, even though it "may seriously affect neutral third parties." *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 303 (1971); *ILA II*, 53 U.S.L.W. at 4923-24 & n.18, 4927; *ILA I*, 447 U.S. at 507-08 & n.22; *NLRB* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607, 614 (1980); *Local 761, International Union of Electrical, Radio, and Machine Workers* v. *NLRB*, 366 U.S. 667, 673-74 (1961).

Thus, the court of appeals did not bless "a new category of provisions . . . neither lawful nor unlawful *ab initio* . . . ." Pet. 13. By requiring an inquiry into the facts rather than summarily condemning the Clause on unsupported inferences, Judge Weis exhibited awareness that "Congress, in enacting § 8(e), . . . 'had no thought of prohibiting agreements directed to work preservation.'" *ILA I*, 447 U.S. at 506 (quoting *National Woodwork*, 386 U.S. at 640). This broad approval of

all work preservation agreements compels rejection of the invitation to judge the purpose of the Clause and the manner in which it functions oblivious to the labor cost advantage enjoyed by coal operators not signatory to the NBCWA, and the effect of that economic reality on job opportunities at NBCWA operations. *ILA II*, 53 U.S.L.W. at 4924-25; *ILA I*, 447 U.S. at 506, 523; *National Woodwork*, 386 U.S. at 644 & n. 38.

Petitioners describe the final step of the analysis, the Third Circuit's review of their arguments against the Clause, App. 12a-14a, as approval of a provision with "foreseeable" secondary applications. Pet. 13, 18. Judge Weis reviewed these arguments merely to guide the trial court and the litigants on remand, correctly concluding and also illustrating that the applications of the purchased coal clause relied upon to characterize it as a "union signatory" clause cannot be judicially established in the absence of a "fact-based" inquiry. *See ILA II*, 53 U.S.L.W. at 4929. The court of appeals properly required proof of such facts prior to any condemnation of the Clause.

This routine affirmation of traditional methods for determining the legality of collective bargaining contracts challenged under § 8(e) presents no conflict with this Court's decisions. Nor is any fundamental question of statutory interpretation posed by the court of appeals' insistence upon an inquiry into the purpose and function of the Clause.

B. This Case Is Not Ripe For Review On the Merits

Applying the *National Woodwork* test, the court of appeals found the record insufficient to reach petitioners' claim that the Clause operates as a "union signatory" provision. The ruling below ". . . is strictly a pre-trial order that decides only one thing—that the case should go to trial." *Switzerland Cheese Assoc.* v. *Horne's Market*, 385 U.S. 23, 25 (1966). This litigation is, accord-

ingly, not ripe for the merits ruling sought by the coal companies.

By eschewing any factual development of their contentions, the delinquent operators have presented a record to this Court devoid of any facts to support their portrayal of the Clause as a "union signatory" device. To condemn the purchased coal clause on a record that only confirms its primary purpose and is barren of any secondary applications would frustrate the Union's lawful collective bargaining efforts to preserve its members' jobs and thus ". . . jeopardize the other, non-secondary boycott purposes of the labor laws." *United Scenic Artists* v. *NLRB*, 762 F.2d at 1037.

The lines drawn by the Third Circuit, while not "glaringly bright," *Local 761, I.U.E.* v. *NLRB*, 366 U.S. at 673, are no more subtle than the statute engendering them.[8] Petitioners' complaints about the cost and duration of the remand, Pet. 13, 19, are inconsistent with their decision to refrain from introducing into this record any facts regarding the "many . . . foreseeable" secondary applications of the Clause. Pet. 13, 18-19; J.A. 455-56. Ten years of experience under the NBCWA must surely have furnished evidence to support the hypothesized secondary applications of the Clause, if such evidence exists. To conserve the resources of the courts and the litigants, petitioners should have developed such evidence below.

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[8] The complaint that the Third Circuit has burdened petitioners by requiring a review of each "transaction," Pet. 19, is specious. By their very nature, all "union standards" clauses require a case-by-case examination of the relative labor costs involved in subcontracting decisions. Federal courts are not unequipped to handle such details expeditiously and economically. *See* FED. R. CIV. P. 16(c). For example, commercial lawsuits often encompass many separate "transactions" but are, nonetheless, grist for the judicial mill.

Because the purchased coal clause resides in a multi-employer contract, any determination of the merits should await judicial consideration of the industrial realities which make the Clause necessary.[9] Both the BCOA and the Union, cognizant of the "economic personality" of the bituminous coal industry, affirm the legality of the purchased coal clause as a collectively bargained measure designed to preserve jobs from "the threat of displacement" caused by the labor cost differential between NBCWA operators and other coal operators, including those signatory to other UMWA agreements, agreements with other unions, or no union agreement at all.[10] *National Woodwork* v. *NLRB*, 386 U.S. at 644

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[9] Contrary to the Petition, at 17, the *ILA* cases came to this Court initially on a sharp and extensive circuit conflict, and not merely because the container rules were part of a "national" contract. *ILA I*, 447 U.S. at 493. Both *ILA I* and *ILA II* were heard after a substantial factual record was developed by the National Labor Relations Board.

[10] Petitioners invoke the history of litigation over the Clause's predecessors. Pet. 15-17. However, that history counsels awaiting a full record. Only in one case, *Riverton Coal Co.* v. *NLRB*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972), was the attack ultimately successful. The other cases affirm that the predecessors of purchased coal clause are "union standards" clauses. *W. A. Boyle*, 179 NLRB 479, 480 (1969), *appeal dismissed*, 468 F.2d 1139 (D.C. Cir. 1972); *UMWA (Dixie Mining)*, 188 NLRB 753, 755 (1971). The delay in this approval of the Clause's antecedents resulted from the Board's refusal to accede to the presumptive validity of "union standards" agreements in general, and not from proven secondary application. *See, e.g., Truck Drivers Union Local No. 413* v. *NLRB*, 334 F.2d at 548.

Riverton, as petitioners acknowledge, does not conflict with the decision below. Pet. 17 n.8. The Third Circuit correctly described *Riverton* as turning on trial evidence showing that the union sought, by means of the clause challenged there, to force Riverton to pressure its affiliates to recognize the UMWA. App. 15a. Indeed, the *Riverton* court found that the union had endeavored, independent of the Clause, to force Riverton to compel its non-signatory subcontractors to sign UMWA agreements. 453 F.2d at 1038-39. No such evidence has been adduced in this case.

n.38. A "definitive" ruling on the Clause's legality should not issue blind to the facts informing the bargainers.

CONCLUSION

The ruling below is purely interlocutory, is faithful to this Court's decisions and presents no important question of statutory interpretation. No other consideration favoring this Court's review under its Rule 17 has, or can be, invoked. The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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No. 84-2013

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DUQUESNE LIGHT COMPANY *et al.*,
Petitioners,

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT TRUSTEES OF THE UMWA HEALTH AND RETIREMENT FUNDS

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QUESTION PRESENTED

Whether the Court of Appeals properly held that the legality of the "purchase-of-coal clause" of the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981, under § 8(e) of the National Labor Relations Act, could not be determined on summary judgment where no inquiry had been conducted into the purpose of the clause or the manner in which it had been applied.

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BRIEF IN OPPOSITION FOR RESPONDENT TRUSTEES OF THE UMWA HEALTH AND RETIREMENT FUNDS

STATEMENT OF THE CASE

This case arises out of the efforts of the respondents, Trustees of the United Mine Workers of America Health and Retirement Funds ("Trustees"), to collect contributions due to the Funds under what is known as the "purchase-of-coal" clause of the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981 ("Agreements" or "NBCWA"). Petitioners, certain coal operators who are signatory to these Agreements, have resisted payment on the ground that the clause, on its face, has a secondary purpose in violation of § 8(e) of the National Labor Re-

lations Act ("NLRA"), 29 U.S.C. § 158(e).[1] The operators moved for summary judgment that the clause was *per se* unlawful and their motion was granted by the District Court. App. 50a.[2] The Court of Appeals for the Third Circuit reversed, holding that "the prohibited secondary objective is not revealed by the language of the collective bargaining agreement here, and further inquiry is necessary." App. 12a. Accordingly, the Third Circuit remanded the case to the District Court for fact finding consistent with the guidelines set forth in the opinion. App. 17a.[3] The coal operators are now petitioning this Court to review the Third Circuit's order vacating summary judgment.

A. The Purchase-of-Coal Clause Litigation

The coal operators' petition, as they note, Pet. 3, grows out of litigation that has previously been before this Court. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982). The Trustees have filed lawsuits against coal operators, including petitioners here, to collect certain contributions due to the Funds under the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981. These Agreements require each signatory company to make contribu-

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[1] The signatory operators are not of one mind on this issue. The Bituminous Coal Operators' Association, Inc., the national bargaining representative that negotiated the three Agreements containing the clause at issue, filed a brief amicus curiae in the Court of Appeals supporting the clause's legality under § 8(e) and arguing for reversal of the District Court's summary judgment holding to the contrary.

[2] References to the Appendix filed with the petition ("Pet.") will be cited as "App. ——"; references to the Joint Appendix filed in the Court of Appeals will be cited as "J.A. ——."

[3] The Third Circuit denied petitions for rehearing en banc on April 1, 1985. App. 52a-57a. By order of April 17, 1985, the Court of Appeals stayed its mandate until June 30, 1985, or, with the timely filing of a petition for certiorari, final disposition by this Court.

tions to the Funds based upon the coal it produces, measured by the employee hours worked and the tonnage of coal mined. J.A. 862, 902, 231-32. The Agreements further require signatory companies to make an approximately equivalent contribution to the Funds based upon the tonnage of coal purchased as to which no contribution has previously been made. J.A. 862, 902-03, 232; App. 3a, 4a, 12a. This latter provision is the "purchase-of-coal clause" and is the subject of these lawsuits.[4]

B. The Positions of the Parties

The operators maintain in this litigation that they are not obligated to make contributions under the purchase-of-coal clause because the clause is a union signatory clause violative of § 8(e) of the NLRA.[5] They argue that the purchase-of-coal contribution, in effect, applies only to purchases from companies which are not signatory to a contract with the International Union, United Mine Workers of America ("UMWA"). Consequently, the operators contend, the clause puts secondary pressure on non-signatories to recognize the UMWA.

The Trustees and the UMWA argue that the clause is neutral on its face and does not have a secondary purpose or effect. Rather, the Trustees and the UMWA contend, there is a significant differential in labor costs between signatory and nonsignatory operators—a differ-

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[4] The Court of Appeals described the interplay between the two clauses as follows: "When read in conjunction with the 'produced-coal clause', the effect [of the purchase-of-coal clause] is to require an employer-signatory to pay an identical contribution to the Health and Retirement Funds whether the coal was extracted from the employer's mines or was bought from an operator that had not already paid the contribution on the assessed tonnage." App. 4a (footnote omitted).

[5] Certain operators have also argued that the purchase-of-coal clause violates Section 1 of the Sherman Act, 15 U.S.C. § 1. The Third Circuit did not rule upon this contention, App. 3a, 12a, and petitioners do not raise the issue here.

ential attributable to the more comprehensive and costly wage and benefit package of miners covered by the Agreements—and this differential provides signatory companies with an incentive to purchase coal rather than produce it themselves.[6] The UMWA designed the purchase-of-coal clause to eliminate this incentive by equalizing

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[6] The evidence already in the record shows a long-existing differential between the labor costs of signatory and nonsignatory companies. Thus, for example, studies performed by the Bureau of Labor Statistics of the United States Department of Labor ("BLS") over a ten-year time span disclose the existence of a significant differential between NBCWA and non-NBCWA labor costs. In 1971, BLS published data comparing the compensation—including health and retirement benefits—of UMWA miners covered by the NBCWA with the compensation provided to non-UMWA miners. J.A. 1409-16. This survey showed that total compensation—including pay for vacations, holidays, and other leave, as well as health, retirement, and other insurance programs—for UMWA miners covered by the NBCWA was almost double that of non-UMWA miners. J.A. 1411. This disparity resulted in large measure from the higher costs incurred by signatory companies in providing health and retirement benefits to their mining employees. J.A. 1412. The BLS conducted a subsequent survey for the period January 1976 through March 1981. J.A. 1336-99. This survey shows that the differential in the benefits, and hence the labor costs, of signatory and nonsignatory operators continued to exist throughout the period of the purchase-of-coal clauses at issue in these cases. *See, e.g.*, J.A. 1363, 1364, 1366, 1373, 1386.

Moreover, these studies, when considered with other evidence in the record, suggest that not only is there a differential in labor costs that exists generally in the industry, but that there is in fact no nonsignatory company that has labor costs comparable to those of signatory companies. As explained in an affidavit of Donald E. Pierce, Jr., consulting economist to the UMWA, even if a nonsignatory company offered its employees health and retirement benefits comparable to those provided by signatory companies, the cost of the multiemployer health and pension benefits provided by the signatory companies would far exceed the costs incurred by nonsignatories. This is because the NBCWA operators, unlike nonsignatory employers, are required to provide health and retirement benefits to a relatively large number of retired employees who are no longer helping to generate income to pay the benefits. J.A. 933, 998-1001.

the labor cost component of the price of coal. By structuring the clause in this way, the Trustees and the UMWA contend, the parties to the National Agreements devised a valid "union standards" clause that protects the work of the miners of each signatory employer from the threat created by the lower labor costs of nonsignatory mines. The clause was not intended to further the UMWA's organizational efforts and had no such effect. Thus, the Trustees and the UMWA contend the purchase-of-coal clause will be shown on a full record to be lawful under 8(e).

C. The Status of the Proceedings

In the first stage of the proceedings, the Trustees argued that the illegality defense was not available to the delinquent operators in these collection actions. In *Kaiser Steel Corp.* v. *Mullins*, *supra*, this Court rejected that argument, holding that the federal courts should adjudicate the merits of the operators' illegality defenses, including their claim that the purchase-of-coal clause violates § 8(e) of the NLRA.

The *Kaiser Steel* case was remanded to the District Court, where it was later consolidated for pre-trial purposes, pursuant to 28 U.S.C. § 1407(a), with other purchase-of-coal cases. Only limited discovery occurred in the consolidated proceedings, however, because the coal operators moved for summary judgment. The operators contended that no discovery was necessary because the language of the clause itself manifested an unlawful secondary purpose. The District Court agreed and, without conducting an inquiry into the purpose of the clause or its application, held it unlawful under 8(e). App. 34a-35a. The Court of Appeals reversed.

D. The Opinion Below

The thrust of the decision by the Court of Appeals is that "the complexity surrounding the primary and secondary dichotomy under § 8(e)" renders this case inappropriate for summary judgment. App. 11a. More specifically, the Court held that the legality of the purchase-of-coal clause depends upon its purpose, which cannot be ascertained from the language itself. App. 11a-12a. Thus, the Court held, in order to determine the purpose of the clause, the trial court must inquire into disputed issues of fact, such as whether the labor costs of the non-union operator are lower than the signatory's by an amount equal to or greater than the amount of the purchase-of-coal contribution. If the purchase-of-coal clause contribution is less than the differential in labor costs between NBCWA and non-NBCWA mines, "then [the non-union operator] has not been put at a competitive disadvantage with coal produced in a union mine." App. 12a. In other words, the imposition of the clause would not put secondary pressures on non-NBCWA operators to organize their mines. Rather, the clause would be serving only to equalize costs and remove the incentive to buy coal mined by operators with lower labor costs, an incentive threatening the jobs of the miners in each signatory mine. App. 12a-14a. In addition, the Court of Appeals held, the fact-finder must determine whether the coal purchased by a signatory company is the kind it has the ability to mine. This factual issue raises "questions * * * about whether traditional work of the bargaining unit is at risk, the criterion that justifies the legality of work preservation rules." App. 13a.

In sum, the Court of Appeals held that the legality of the clause cannot be determined until the relevant facts, applicable to each signatory, are ascertained. App. 16a. As the Court of Appeals pointed out:

> "None of these matters have been resolved on this record. The trustees and the union submitted evidence in the district court that, by and large, the gap between the labor cost of signatories and non-union producers exceeds the amount of the purchased-coal clause exaction. That fact, however, has not been conceded by the signatories nor judicially established. The other variables that we have listed also require development, as they apply in a particular case." App. 14a (footnote omitted).

In the words of the Court of Appeals, "*Kaiser Steel* v. *Mullins* points the way in holding that a signatory may raise the defense of illegality in a suit for contributions by the trustee." App. 16a. Each signatory is entitled to defend the Trustees' suit for contributions on the ground that the clause is unlawful; but this determination requires an inquiry into "whether the clause is valid as a surrogate union standards or work preservation clause, or whether it contravenes § 8(e) as a union signatory clause * * *." App. 17a.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION AND SUMMARY

In their petition, the coal operators seek to have this Court rule on the legality of the purchase-of-coal clause in the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981 before the parties have had an opportunity to develop a factual record reflecting the history of the provision, its purpose and its application in the cases involved in this litigation. The operators contend that the Third Circuit has erred in requiring that such a record must be developed in order for the legality of the clause to be determined. In particular, the operators argue here that (1) the decision of the Third Circuit raises an unsettled issue of national labor policy, Pet. 7-14; (2) the question of the legality of the clause is important to the stability of the coal industry,

Pet. 14-17; and (3) under the principles set forth in the Third Circuit's decision, litigating the legality of the clause will be both difficult and expensive, Pet. 18-20.

None of these contentions argues in favor of review by this Court. First, the holding of the Third Circuit is dictated by the § 8(e) analysis set forth by this Court in *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967), and followed consistently by this Court, most recently in *NLRB* v. *International Longshoremen's Ass'n*, 53 U.S.L.W. 4919 (June 27, 1985) (*"ILA II"*). It raises no new issue of labor policy or law and does not conflict with the decision of any other Court of Appeals.

Second, the issue that petitioners contend is important to the coal industry—the legality of the purchase-of-coal clause—was not reached by the Third Circuit. The Court declined to rule on this issue in the absence of a more fully developed factual record. Consequently, this issue is not ripe for review by this Court.

Finally, even if litigating the legality of the purchase-of-coal clause should prove difficult or expensive, this would not mean that the Third Circuit should have found the clause *per se* unlawful, thus avoiding this expense.

In short, the holding of the Third Circuit—that the legality of the purchase-of-coal clause cannot be resolved without examining the facts—does not warrant review by this Court.

II. THE OPINION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS AND RAISES NO UNSETTLED ISSUES OF NATIONAL LABOR POLICY.

The issue raised in this litigation is whether the purchase-of-coal clause in the National Bituminous Coal Wage Agreements of 1974, 1978 and 1981 violates § 8(e) of the NLRA. Section 8(e) provides in relevant part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement * * * whereby such employer ceases or refrains or agrees to cease or refrain from * * * dealing in any of the products of any employer, or to cease doing business with any other person * * *."

The Court of Appeals below recognized that this provision "reaches only 'secondary' pressures." App. 8a. In other words, " 'primary' activity, such as work preservation, is not prohibited, even though secondary effects may be present." *Id.* There are, the Court of Appeals further explained,

> "Two well recognized primary provisions [that] have emerged—work preservation and union standards clauses. If the union's objective is to retain work that is traditionally performed by employees represented by the union and also within the contracting employers' power to assign, § 8(e) is not a bar. *NLRB* v. *International Longshoremen's Ass'n, AFL-CIO*, 447 U.S. 490, 504 (1980). So long as the union has no forbidden secondary purpose to affect the employment relations of an outside employer, the agreement is valid even though it adversely affects the employment opportunities of non-represented workers." App. 9a.

In applying this standard, the Court of Appeals explicitly followed the dictates long established by this Court for analyzing collective bargaining agreements under 8(e). *National Woodwork Manufacturers Ass'n* v. *NLRB*, *supra*, 386 U.S. at 612, provides the starting point. There, this Court made clear that, in enacting 8(e), Congress meant to reach only "secondary pressures." *Id.* at 638. The "central aspect" of unlawful secondary activity, this Court observed, is the employment of "pressure tactically directed toward a neutral employer in a labor dispute not his own." *Id.* at 623 (footnote omitted). In contrast, "employees' activity to

pressure their employer to preserve for themselves work traditionally done by them" is primary and lawful, and "§ 8(e) does not prohibit agreements made and maintained for that purpose." *Id.* at 635.[7]

In short, as this Court stressed in *National Woodwork*, legality under § 8(e) turns on "whether, *under all the surrounding circumstances*, the Union's objective was preservation of work for [the primary employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy the union objectives elsewhere * * *." *Id.* at 644 (emphasis added). This is not, as this Court recognized, "a simple test to apply." *Id.* at 645.

This Court has consistently followed the analytical approach to 8(e) cases set forth in *National Woodwork*. *NLRB* v. *International Longshoremen's Association*, *supra*, is the most recent of the § 8(e) cases. There, this Court addressed for the second time the "Rules on Containers," which reserve to longshoremen represented by

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[7] The petitioners would have the Court look back to *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), a case analyzing § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (1982). The rule enunciated in *Denver Building Trades* for § 8(b)(4) cases is no different, however, from *National Woodwork*'s § 8(e) analysis. This Court stated in *Denver Building Trades* that "§ 8(b)(4) restricts a labor organization and its agents in the use of economic pressure where an object of [the pressure] is to force an employer or other person to boycott someone else." 341 U.S. at 687. The legality of the strike there at issue, therefore, depended upon whether it had such "a proscribed object." *Id.* Similarly, the Court in *National Woodwork* made clear that the legality of the provision at issue there depended upon whether the objective of the union was work preservation or whether the objective was to put pressure on a neutral employer. *National Woodwork*, *supra*, 386 U.S. at 623, 635. The legality of the provision at issue here too, therefore, depends upon whether it was motivated —in part or in whole—by an unlawful secondary purpose. Thus, there is nothing in *Denver Building Trades* that would suggest any different approach from that followed by the Third Circuit.

the ILA any work, loading or unloading containers owned or leased by shipping companies, that is to be done within 50 miles of port. If an employer violates the Rules, it is liable to pay the ILA $1000 per container in liquidated damages. The question presented in *ILA II* was whether the Rules violate 8(e).

After examining closely the factual record developed by the Administrative Law Judge and the National Labor Relations Board, this Court held that the Rules did not contravene 8(e). The Court concluded that the Rules had a "clear primary objective to preserve work in the face of a threat to jobs." 53 U.S.L.W. at 4924. Further, there was "no evidence of 'any significant ILA interest in the labor relations of the class of employers boycotted by the Rules.'" 53 U.S.L.W. at 4925. This Court stated explicitly that the case was governed by *National Woodwork*, and, applying the analysis set forth there, held the Rules were valid.

The Courts of Appeals, since *National Woodwork*, have consistently based their 8(e) analyses on the propositions set forth above—that 8(e) requires a determination as to whether an agreement has a primary purpose to protect union work or work standards or a secondary purpose to organize non-union labor, and that that determination requires a deliberate factual inquiry. *See, e.g., Sheet Metal Wks. Int'l Ass'n* v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974); *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178, 1181 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *A. Duie Pyle, Inc.* v. *NLRB*, 383 F.2d 772, 775-76 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968); *Frito-Lay, Inc.* v. *Retail Clerks Union Local No. 7*, 629 F.2d 653 (10th Cir. 1980).[8]

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[8] There are, as petitioners suggest, Pet. 10, a few cases in which the Courts have found that the language of a clause itself manifested a secondary purpose. This was essentially the holding in *Pacific Northwest Chapter of Associated Builders & Contractors,*

Nevertheless, the petitioners here contend that the Third Circuit erred in declining to hold the purchase-of-coal unlawful under 8(e) on summary judgment, and that this decision raises an "unsettled issue" of national labor policy. The petitioners do not dispute that there has been no factual inquiry made into the purpose of the provision. Rather, they contend that the clause is "[a] 'classic' union signatory clause, which is illegal *per se*," because it "*inhibits* all dealings with non-signatories." Pet. 12 (emphasis in original). The Third Circuit, the petitioners argue, "recognized that the purchased-coal clause requires a signatory to discriminate in its dealings

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Inc. v. *NLRB*, 654 F.2d 1301 (9th Cir. 1981), *aff'd in part sub nom. Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), and *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981). The Third Circuit's decision here is consistent with these cases. Thus, the Court recognized that where the language of the " 'clause forces the licensee-employer to abide by the union recognition portion of the contract' " it is a "union signatory clause[]" prohibited by 8(e). App. 10a. In this case, by contrast, the Third Circuit explicitly found that a "prohibited secondary objective [was] not revealed by the language" of the clause. App. 12a. The purchase-of-coal clause does not force signatory operators to purchase coal only from other unionized operators. Rather, the clause on its face requires only that a signatory who purchases coal make the same contribution to the Funds that it would be required to make if it had produced the coal itself. Thus, the Third Circuit correctly concluded that, under *National Woodwork*, the clause could not be determined unlawful on its face.

Petitioners also rely, Pet. 11-12, upon *General Longshore Workers, ILA Local No. 1418 (New Orleans Steamship Ass'n)*, 235 N.L.R.B. 161 (1978), as a case that conflicts with the Third Circuit's ruling. It does not. This was a decision of the NLRB invalidating the imposition of a $2 per ton royalty on cargo loaded or unloaded by non-ILA labor. There, the Board found specifically that the royalty bore no relationship to lost work opportunities by the applicable ILA bargaining unit. In fact, as noted by the Board, the ILA disclaimed any work preservation objective. *Id.* at 167. In any event, the ruling of the Board was based upon an evidentiary hearing—which is what the Third Circuit held was necessary before the legality of the purchase-of-coal clause could be determined.

on the basis of union-status." Pet. 13. Under these circumstances, the petitioners conclude that the Third Circuit adopted a "radically different approach" to 8(e) analysis by remanding the case to the District Court for trial. *Id.*

The Third Circuit, however, did not find that the purchase-of-coal clause "requires a signatory to discriminate in its dealings on the basis of union-status." The whole point of the Third Circuit decision was that such a determination is fact-bound and cannot be made until the factual record is complete. Thus, the Court made clear that the question whether the purchase-of-coal contribution puts a non-NBCWA coal operator at a competitive disadvantage depends, *inter alia*, upon the difference in labor costs between the NBCWA and non-NBCWA mines and whether the contribution approximates that difference. App. 12a-13a. In the Court's words, whether or not the clause discriminates against non-NBCWA companies so as to put pressure on them to organize is a question that "must depend upon individualized fact finding." App. 17a.

In sum, the Court of Appeals holding is consistent with *National Woodwork* and its progeny which require the development and analysis of a factual record before the legality of a provision under 8(e) can be determined. As this Court reflected in *ILA II*, "[t]he various linguistic formulae and evidentiary mechanisms we have employed to describe the primary/secondary distinction are not talismanic nor can they substitute for analysis." 53 U.S.L.W. at 4924. The Third Circuit remanded this case to the District Court so that this analysis can be conducted. Consequently, the decision of the Third Circuit at this stage in the proceedings raises no "unsettled" issues of labor policy for review by this Court.

III. SINCE THE THIRD CIRCUIT DID NOT RULE UPON THE LEGALITY OF THE CLAUSE, REVIEW OF ITS DECISION IS NOT WARRANTED.

In Parts II and III of the petition, the petitioners argue that the lengthy history of this litigation, the importance of the clause in the coal industry, and the potential costs of developing a record support their view that the Third Circuit's decision should be reviewed by this Court. Pet. 15-20. Petitioners outline the history of the litigation over predecessors to the purchase-of-coal clause and suggest that they hoped all the litigation would be resolved by their summary judgment motions. They express their disappointment that "[r]ather than ending the twenty year conflict over the legality of the purchased-coal clause, the Third Circuit's decision can only serve to expand and prolong this controversy for as long as the clause remains in force." Pet. 17. Moreover, the petitioners assert, "the cost of applying [the Third Circuit's decision] will be staggering for the courts and all parties concerned." Pet. 18.

These concerns, however, do not support review of the Third Circuit's ruling by this Court. The Third Circuit concluded that, under settled law, the legality of the purchase-of-coal clause cannot be resolved absent the development of a factual record. The amount of time it will take to develop this record, and the extent of the costs to be incurred, cannot be ascertained now. Whatever that effort may be, however, avoiding it could not justify holding the purchase-of-coal clause unlawful *per se* without abandoning the principles set forth in *National Woodwork* and its progeny.

This case is not in the same posture as *ILA II*. There, the NLRB developed a substantial record which disclosed the history of the Rules at issue, their purpose and their application to the shipping industry. The case was ready for final resolution. Here, there is no comparable record.

Nor is there any comparable decision below on the legality issue.[9]

Furthermore, the facts developed to date indicate that the clause has a lawful primary purpose and was designed to protect the work and work standards of the employees of each signatory employer by eliminating the incentive of the signatory company to subcontract work to employers with inferior working conditions and cheaper labor costs. More particularly, the record shows that there is a significant differential between NBCWA and non-NBCWA labor costs such that the purchase-of-coal clause serves only to equalize those costs; that this differential has persisted throughout the period that the clause has been in effect; and that there are no non-NBCWA coal operators whose labor costs are comparable to the NBCWA.[10] The record further shows that the clause was not intended, and has not been used, as a union organizing device. Consequently, the Trustees believe that when the record is fully developed, they will prevail.

In sum, contrary to the suggestion of petitioners, the development of a record will not be a futile exercise—it is, in fact, the only way to reach the issue petitioners raise, that is, the enforceability of the purchase-of-coal clause. Under the circumstances, the Third Circuit's denial of petitioners' summary judgment motion presents no issue warranting review by this Court.

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[9] The decisions cited by petitioners, Pet. 15, with the exception of *Kaiser Steel Corp.* v. *Mullins*, *supra*, and *Local Union 6046, UMWA (Plateau Coal Sales, Inc.)*, N.L.R.B. Cas. Nos. 9-CC-1161-1-2-3 (filed Feb. 4, 1982), an unresolved NLRB proceeding, all involved predecessors of the purchase-of-coal clause.

[10] See note 6, *supra*.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

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No. 84-2013

IN THE

Supreme Court of the United States

October Term, 1985

DUQUESNE LIGHT COMPANY, et al.,
Petitioners,

v.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA, et al.,
Respondents.

REPLY TO OPPOSITIONS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY TO OPPOSITIONS TO PETITION FOR A WRIT OF CERTIORARI

Petitioners, signatory employers under the United Mine Workers of America ("UMWA") National Bituminous Coal Wage Agreement, seek a writ of certiorari for review of a decision that compels repeated trials to determine the legality in each application of a provision in the National Agreement that adds a fixed and unconditional penalty of $2.24 on every ton of coal purchased by a signatory from a non-signatory, while freely allowing purchases from other signatories.

In their separate Oppositions, Respondents assert that the decision below is an unremarkable application of the settled doctrine of *National Woodwork Manufacturer's Association v. NLRB*, 386 U.S. 612 (1967), and *NLRB v. International Longshoremen's Ass'n.*, 53 U.S.L.W. 4919 (U.S. June 27, 1985) ("ILA"). They also contend the Third Circuit really did not decide the legality of the clause and that review at this stage is not warranted.

We respond here to each of these contentions.

1. The Purchased-Coal Clause Differs Sharply From Agreements Previously Considered By This Court.

The purchased-coal clause of the UMWA National Agreement is unlike the provisions considered by this Court in *National Woodwork* and *ILA*. In *National Woodwork* the disputed clause required only that specified work be performed on the job site. The clause did not distinguish between off-job site work performed by union workers and off-job site work performed by non-union workers. The Rules on Containers in *ILA* were limited to protecting certain work traditionally performed on the

dock. The Rules required only that all such work be performed on the dock or that a penalty be paid.

By contrast, the UMWA National Agreement by its terms requires a signatory to discriminate in its dealings on the basis of union status. A signatory employer may freely purchase coal that might otherwise have been produced by its own employees, but can do so only from another signatory operator.[1] The clause on its face applies without regard to the wages and benefits paid by a non-signatory operator to its employees. The burden of the $2.24 per ton penalty can be avoided by the non-signatory only by becoming a UMWA signatory.[2]

This type of clause, because of its overbreadth—because it is not tailored strictly to satisfy legitimate union interests—can properly be condemned on its face as a violation of Section 8(e) of the National Labor Relations Act. The inquiry into subjective intent mandated in *National Woodwork* and *ILA* with respect to clauses that were neutral as to the union status of other employers simply is not necessary where, as here, a concern with union status is inherent in the terms of the contract.

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1. The purchased-coal clause itself only requires payment when contributions to the Trustees have not previously been made. This must be read in conjunction with the UMWA pension plans, which are incorporated in the National Agreement, and which permit the Trustees to accept contributions only from "Employers." The term "Employer," in turn is defined as a signatory to the National Agreement. App. B, p. 23A.

2. The UMWA argues that the clause does not discriminate against non-signatories because it also applies to delinquent National Agreement signatories and UMWA organized employers not signatory to the National Agreement. The record does not reveal any effort to apply the clause to employers in either such category, assuming they exist. The Court of Appeals concluded that application of the clause to delinquent signatories would itself be illegal. App. 13a. Moreover, such applications would not alter the incontestable fact that a non-signatory can only avoid the imposition of the purchased-coal clause penalty by becoming a UMWA signatory.

2. The Third Circuit Decided A Matter Of Substance When It Ruled That A Union Status Based Penalty Is Not Illegal Per Se.

Lower federal courts, until the Third Circuit decision below, uniformly condemned clauses that on their face drew such a broad and absolute distinction between dealings among signatories and dealings with a non-signatory. *See, e.g., Riverton Coal Co. v. UMWA*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972); *Pacific Northwest Chapter of Associated Builders v. NLRB*, 654 F.2d 1301 (9th Cir. 1981), *aff'd in relevant part sub nom. Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); and *Amax Coal Co. v. NLRB*, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, 453 U.S. 322 (1981). These courts have done so without relying on an elaborate inquiry into the union's purpose or the clause's effect. They have done so because such a provision is blind to whether the non-signatory pays its workers the same wages and offers the same benefits as are enjoyed by signatory employees. Such a provision also is blind to whether the work opportunities of the signatory's employees could possibly be affected by the purchase. The work of a signatory's employees will not be affected, for example, by a purchase of coal that the signatory is not capable of supplying.

To allow a clause that operates this way to survive summary judgment destroys a well-developed bright line rule of application of Section 8(e) of the National Labor Relations Act. It allows a union's proclamation of an innocent intent to justify the use of a chain saw when a scapel would accomplish the union's legitimate objective. The Third Circuit decision should be reviewed by this Court to prevent erosion of a union's obligation to be concerned with its means as well as its ends in seeking to avoid the effects of non-union competition.

CONCLUSION

For the reasons stated above and in our Petition for Certiorari the writ should be granted.

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